APPENDIX

IN THE MATTER OF THE TRIAL OF THE IMPEACHMENT OF SAMUEL S. SMITH

The State of Florida to John D. Melton, Sergeant at Arms of The Florida Senate, greetings:

You are hereby commanded to deliver to and leave with the Honorable Samuel S. Smith, wherever you may find him, an attested copy of the attached summons, this precept, the Articles of Impeachment, a copy of the Rules of Practice and Procedure adopted for this trial, and a copy of the Notice of pre-trial hearing dated April 21, 1978, or if that cannot conveniently be done, to leave an attested copy at his last known place of abode, or at his usual place of business, in some conspicuous place therein; and in whichsoever way you perform the service, let it be done at least ten days before the appearance day mentioned in said summons.

Fail not, and make your return with your proceedings thereon endorsed, on or before the appearance day mentioned in the said summons.

WITNESS the Honorable Lew Brantley, President of The Florida Senate at Tallahassee, Florida, this 21st day of April, 1978.

Lew Brantley
President, The Florida Senate

IN THE SENATE OF THE STATE OF FLORIDA SITTING AS A COURT OF IMPEACHMENT

IN RE: TRIAL OF THE IMPEACHMENT OF SAMUEL S. SMITH

SUMMONS

THE STATE OF FLORIDA TO SAMUEL S. SMITH, GREETING:

WHEREAS, The House of Representatives of the State of Florida did on the 18th day of April, 1978, exhibit to the Senate Articles of Impeachment against you, the said Samuel S. Smith, in the words following:

HOUSE RESOLUTION NO. 1560

Articles of Impeachment

The following Articles of Impeachment were adopted by the House of Representatives on April 12, 1978.

Donald L. Tucker
Speaker of the House of Representatives

(SEAL)

Allen Morris
Clerk, House of Representatives

House Resolution 1560

ARTICLES OF IMPEACHMENT

Select Committee on Impeachment: Inquiry into the Conduct of Circuit Court Judge Samuel S. Smith of the Third Judicial Circuit

A resolution of the House of Representatives of the State of Florida preferring Articles of Impeachment against Samuel S. Smith, a duly commissioned Circuit Court Judge of the Third Judicial Circuit of the State of Florida; providing for the presentation of Articles of Impeachment to the Senate of the State of Florida; requesting the trial thereof; appointing a committee of the House to manage, present and prosecute Articles of Impeachment at trial before the Senate with or through counsel; and providing for the use of impeachment committee counsel and staff, and if required, the employment and compensation of all necessary personnel required in the prosecution of these Articles, and other expenses of case preparation, trial subpoenas and compensation of witnesses.

WHEREAS, a committee of this body of the 1978 Legislative Session was appointed on January 31, 1978, by the Speaker of the House of Representatives to investigate charges of official misconduct of Circuit Court Judge Samuel S. Smith of the Third Judicial Circuit and make its report and recommendations to the House of Representatives, and

WHEREAS, said committee has performed its duties and, upon a finding of probable cause, by these Articles files its report recommending that said Samuel S. Smith be impeached for misconduct in office and that he be tried for same, removed from office, and disqualified from holding any office of honor or profit, NOW, THEREFORE,

Be It Resolved by the Legislature of the State of Florida:

SECTION 1. That Samuel S. Smith, a duly commissioned Circuit Court Judge of the Third Judicial Circuit of the State of Florida, has been guilty of misdemeanor in office as a judicial officer of the State of Florida for which he, Samuel S. Smith as a Circuit Court Judge, should be, and HE IS HEREBY, impeached of his office under Article III, Section 17, Constitution of the State of Florida; that acts so constituting misdemeanor in office of him, Samuel S. Smith, as a judicial officer, being hereinafter more particularly set forth by way of separate Articles of Impeachment which are hereby found and voted against Samuel S. Smith, as a Circuit Court Judge of the Third Judicial Circuit of the State of Florida, by a two-thirds (2/3) vote of the members of the House of Representatives of the State of Florida, viz:

ARTICLES OF IMPEACHMENT

Articles of Impeachment of the House of Representatives of the State of Florida in the name of themselves and all of the people of the State of Florida against Samuel S. Smith who was heretofore elected, duly qualified, and commissioned to serve as a Circuit Court Judge of the Third Judicial Circuit of the State of Florida.

ARTICLE I

CONVICTION OF A FELONY

That Samuel S. Smith, a duly commissioned Circuit Court Judge of the Third Judicial Circuit of the State of Florida was convicted of a felony on April 29, 1977, by a jury, before a court of competent jurisdiction in the case of the **UNITED STATES OF AMERICA v. SAMUEL S. SMITH, et al,** United States District Court, Middle District of Florida, Jacksonville Division, Case Numbers 77-14 Cr-J-R and 77-14(S) Cr-J-R, and sentenced to three (3) years incarceration on June 3, 1977, for willfully and knowingly combining, conspiring, confederating, and agreeing with others, to commit an offense against the United States; to wit: to distribute and cause to be distributed marijuana, a Schedule I controlled substance under Title 21, United States Code, Section 812, and in furtherance of the conspiracy, Judge Samuel S. Smith performed certain overt acts, knowingly and intentionally possessing with intent to

distribute and causing to be distributed, in excess of approximately 1500 pounds of marijuana, all in violation of 21 USC 841(a)(1) and 846, and 18 USC 2.

WHEREFORE, Samuel S. Smith, by such conduct is guilty of misdemeanor in office and warrants impeachment and removal from office and disqualification to hold any office of honor, trust, or profit.

ARTICLE II

CONSPIRACY TO UNLAWFULLY OBTAIN AND DISTRIBUTE IN EXCESS OF APPROXIMATELY 1500 POUNDS OF MARIJUANA

That Samuel S. Smith, a duly commissioned Circuit Court Judge of the Third Judicial Circuit of the State of Florida, individually and by use of his status as a judicial officer of the State of Florida, did set into motion and actively participate in a conspiracy to illegally obtain and unlawfully distribute for the purpose of sale in excess of approximately 1500 pounds of marijuana, a controlled substance under the Laws of the United States and the State of Florida, seized by the Sheriff of Suwannee County, Florida; and that Circuit Court Judge Samuel S. Smith of the Third Judicial Circuit of the State of Florida committed the following acts in furtherance thereof:

(1) On or about Friday, August 6, 1976, Circuit Court Judge Samuel S. Smith met with Suwannee County Sheriff Robert Leonard and Grover Lamar (Possum) Lee, an investigator with the Public Defender's Office of the Third Judicial Circuit of the State of Florida, in Leonard's office in Live Oak, Florida, and engaged in a conversation about obtaining marijuana which the Sheriff had seized in pursuance of his duties as a law enforcement officer. Smith, as part of the scheme, offered to produce a Destruction Order to cover the removal of the marijuana from the Sheriff's evidence vault.

(2) Approximately one week later Circuit Court Judge Smith, upon meeting Sheriff Leonard in the Suwannee County Courthouse, inquired whether the Sheriff had given any more thought to the deal.

(3) On or about Wednesday, September 8, 1976, Circuit Court Judge Samuel S. Smith called Bondsman Homer F. Ratliff into his chambers in the Columbia County Courthouse and told Ratliff he had access to some marijuana and wanted to know if Ratliff knew anyone who could handle it for Smith.

(4) On or about Thursday, September 9, 1976, Sheriff Leonard talked with Judge Smith by phone relative to the marijuana deal, and a meeting was set for the following day at Judge Smith's home.

(5) The next day, on or about Friday, September 10, 1976, Sheriff Leonard met Judge Smith in the driveway of Smith's home in Lake City, Florida. Smith made reference to the deal and stated that for 500 pounds of marijuana $150,000 could be netted and assured Sheriff Leonard a Destruction Order would be provided. Smith further discussed obtaining 5000 pounds of marijuana which was seized by Sheriff Leonard on September 3, 1976.

(6) On or about Wednesday, September 15, 1976, Judge Smith and Grover Lamar (Possum) Lee met with Duke McCallister, former Sheriff of Suwannee County, and prevailed upon him to persuade Sheriff Leonard to enter into the marijuana scheme.

(7) On or about Thursday, September 16, 1976, Judge Smith called Assistant State Attorney of the Third Judicial Circuit Virlyn Willis into his chambers in the Columbia County Courthouse and offered Willis a share of the marijuana deal in exchange for a guarantee of protection from prosecution.

(8) On or about Friday, September 17, 1976, Judge Smith called Willis and asked him to his home. On that same date Willis visited Smith at Smith's home and was told that Sheriff Leonard had refused to cooperate.

(9) On or about Monday, September 20, 1976, Judge Smith called and told Willis that the marijuana was gone from Sheriff Leonard's possession.

(10) On or about Tuesday, September 21, 1976, Judge Smith went by to see Sheriff Leonard, who was not in.

(11) On or about Wednesday, September 22, 1976, Sheriff Leonard called Judge Smith.

(12) On or about Tuesday, November 16, 1976, Judge Smith and Sheriff Leonard had a phone conversation setting up an afternoon meeting in Sheriff Leonard's office.

(13) On that same day, after noon on or about Tuesday, November 16, 1976, Judge Smith met Sheriff Leonard in his office to discuss plans for Judge Smith to obtain in excess of approximately 1500 pounds of marijuana. The plans were set and the marijuana was to be left by Sheriff Leonard that night at the Live Oak landfill in a truck with the key to the lock on the back of the truck under the mat on the driver's side of the truck.

(14) On or about that same afternoon, Tuesday, November 16, 1976, Judge Smith went by Assistant State Attorney Willis' office.

(15) Later in the afternoon on or about Tuesday, November 16, 1976, Judge Smith called Homer Ratliff. Ratliff returned his call and a meeting was set in the Columbia County Courthouse parking lot that afternoon.

(16) Early in the evening on or about Tuesday, November 16, 1976, Judge Smith and Homer Ratliff met as planned. Smith instructed Ratliff to get some help and a vehicle and pick up some marijuana between 10 and 11 p.m. that night from a truck parked at the Live Oak landfill. Smith told Ratliff that the key to the lock on the back of the truck would be under the mat on the driver's side of the truck.

(17) On or about the night of Tuesday, November 16, 1976, Sheriff Leonard delivered the marijuana to the landfill and placed the key to the lock on the back of the truck under the mat on the driver's side of the truck as agreed with Judge Smith.

(18) Ratliff arranged for the marijuana to be picked up and it was picked up as per Judge Smith's instructions on or about the night of Tuesday, November 16, 1976, between 10 and 11 p.m. by Ratliff, Richard Bradley and Charles Ethridge.

(19) On or about the night of Tuesday, November 16, 1976, after 11 p.m., Sheriff Leonard retrieved the truck from the landfill, as arranged with Judge Smith, and the marijuana was gone.

(20) On or about Wednesday, November 17, 1976, Ratliff phoned Judge Smith and told him everything was all right.

WHEREFORE, Samuel S. Smith, by such conduct is guilty of misdemeanor in office and warrants impeachment and removal from office and disqualification to hold any office of honor, trust, or profit.

ARTICLE III

ATTEMPTED BRIBERY OF OFFICERS OF THE STATE OF FLORIDA TO INFLUENCE PERFORMANCE OF THEIR OFFICIAL DUTIES

That Samuel S. Smith, a duly commissioned Circuit Court Judge of the Third Judicial Circuit of the State of Florida, did in furtherance of the conspiracy outlined in Article II offer bribes to the Sheriff of Suwannee County and the Assistant State Attorney of the Third Judicial Circuit to influence performance of their official duties with respect to the unlawful distribution of seized marijuana in violation of the laws of the State of Florida as follows:

(1) On or about September 10, 1976, in Lake City, Florida, Samuel S. Smith did corruptly offer and promise to Robert Leonard, a public servant, having knowledge of said public servant's official capacity, to wit: Sheriff of Suwannee County, Third Judicial Circuit, a valuable share of $150,000.00 good and lawful money of the United States of America with the intent and purpose to influence the performance of said public servant in properly disposing of marijuana in said Sheriff's custody, which performance Samuel S. Smith believed to be within the official discretion of said public servant, in violation of a public duty, and in performance of a public duty.

(2) On or about September 16, 1976, in Lake City, Florida, Samuel S. Smith did corruptly offer and promise to Virlyn B. Willis, Jr., a public servant, having knowledge of said public servant's official capacity, to wit: Assistant State Attorney for the Third Judicial Circuit, $350,000.00 good and lawful money of the United States of America with the intent and purpose to influence the performance of said public servant by requesting that Willis provide information to Samuel S. Smith resulting from any criminal investigation into Samuel S. Smith's unlawful efforts to obtain marijuana in the custody of the Sheriff of Suwannee County, which performance Samuel S. Smith believed to be within the official discretion of said public servant, in violation of a public duty, and in performance of a public duty.

(3) On or about November 16, 1976, in Lake City, Florida, Samuel S. Smith did corruptly offer and promise to Robert Leonard, a public servant, having knowledge of said public servant's official capacity, to wit: Sheriff of Suwannee County, Third Judicial Circuit, a valuable share of $100,000.00 good and lawful money of the United States of America with the intent and purpose to influence the performance of said public servant in properly disposing of marijuana in said sheriff's custody, which performance Samuel S. Smith believed to be within the official discretion of said public servant, in violation of a public duty, and in performance of a public duty.

WHEREFORE, Samuel S. Smith, by such conduct is guilty of misdemeanor in office and warrants impeachment and removal from office and disqualification to hold any office of honor, trust, or profit.

ARTICLE IV

SUBVERTING THE JUDICIAL PROCESS

That by his conduct Samuel S. Smith, a duly commissioned Circuit Court Judge of the Third Judicial Circuit of the State of Florida, in furtherance of the conspiracy outlined in Articles II and III, did subvert the judicial processes of the Third Judicial Circuit Court and the State of Florida, to wit:

(1) That on or about Friday, August 6, 1976, Samuel S. Smith did offer Suwannee County Sheriff Robert Leonard a Destruction Order to cover the removal of marijuana from Sheriff Leonard's evidence vault, marijuana which Samuel S. Smith intended not be destroyed but obtained and distributed in contravention of the laws of the United States and the State of Florida.

(2) That on or about Friday, September 10, 1976, Samuel S. Smith assured Sheriff Leonard that he would provide a Destruction Order to cover the removal of 500 pounds of marijuana from Sheriff Leonard's evidence vault, marijuana which Samuel S. Smith intended not be destroyed but obtained and distributed in contravention of the laws of the United States and the State of Florida.

(3) That between September 16, 1976, and November 17, 1976, in Suwannee County, Samuel S. Smith, by attempted bribery, did willfully endeavor to obstruct, delay and prevent Virlyn Willis, Assistant State Attorney of the Third Judicial Circuit, from communicating information relating to violations of criminal statutes of the State of Florida to the State Attorney of the Third Judicial Circuit authorized to conduct and engage in investigations of violations of said statutes.

WHEREFORE, Samuel S. Smith, by such conduct is guilty of misdemeanor in office and warrants impeachment and removal from office and disqualification to hold any office of honor, trust, and profit.

ARTICLE V

CONDUCT UNBEOMING A JUDICIAL OFFICER RESULTING IN LOWERING THE ESTEEM OF THE JUDICIARY

That Samuel S. Smith as a Circuit Court Judge of the Third Judicial Circuit, in his conduct as a duly commissioned judicial officer of the State of Florida, has by his infamy and the reasonable and probable consequences of the acts or conduct enumerated in the foregoing Articles debased and degraded the office of Circuit Court Judge and the court of the Third Judicial Circuit into disrespect, scandal, disgrace, discredit, disrepute, and reproach to the prejudice of public confidence in the administration of justice therein, and to the integrity and impartiality of the State Judiciary, placing a stigma thereon so as to render him unfit to continue to serve as a judge or public officer:

(1) In that he was convicted of a felony, by a jury, before a court of competent jurisdiction; and,

(2) In that he set in motion and participated in a conspiracy to illegally obtain and unlawfully distribute marijuana; and,

(3) In that he did offer bribes to officers of the State of Florida to influence performance of their official duties; and,

(4) In that he did by his conduct subvert the judicial processes of the Third Judicial Circuit and the State of Florida.

WHEREFORE, Samuel S. Smith, by such conduct is guilty of misdemeanor in office and warrants impeachment and removal from office and disqualification to hold any office of honor, trust, or profit.

SECTION 2. That Samuel S. Smith, as a Circuit Court Judge of the Third Judicial Circuit of the State of Florida, for misdemeanor in office, be impeached of his office and disqualified from holding any office of honor, trust, or profit.

SECTION 3. That there shall be a House Committee of Managers which shall be known as "The House Committee of Managers: Senate Impeachment Trial of Third Judicial Circuit Court Judge Samuel S. Smith." And that Representative William J. Rish shall serve as Chairman of said committee. Representatives Lee Moffitt and Ronald Richmond shall serve as members of said committee, and Representatives Gus Craig,

Earl Dixon, Elaine Gordon, and Ralph Haben shall serve as alternate members of the House Committee of Managers and serve at the pleasure of the Chairman.

SECTION 4. That the House Committee of Managers be, and they are, hereby instructed to appear before the Senate of the State of Florida and at the Bar thereof in the name of the House of Representatives, and all of the people of the State of Florida, with their counsel, to impeach Samuel S. Smith for misdemeanor in office and to exhibit to the Senate the foregoing Articles of Impeachment against Third Judicial Circuit Court Judge Samuel S. Smith which have been agreed upon by this House, and that the House Committee of Managers request that the Senate issue an Order for the appearance of Samuel S. Smith before the Senate to answer to the Articles of Impeachment and demand his impeachment, conviction, removal from office, and disqualification to hold any office of honor, trust, or profit. And that the House Committee of Managers further request that the impeachment trial be open to the public in the interest of respect for and trust in government by the people of the State of Florida.

SECTION 5. That the House Committee of Managers shall manage, present and prosecute, with or through counsel, the foregoing Articles of Impeachment at the trial thereof by the Senate.

SECTION 6. That the House Committee of Managers on the part of the House of Representatives of the State of Florida, is hereby authorized and empowered to use Impeachment Committee counsel and staff and, upon approval by the Committee on House Administration, employ and fix compensation of all necessary personnel required in the prosecution of these Articles, and other necessary assistance as they may require and, upon approval by the Committee on House Administration, incur such other expenses as may be necessary in the preparation and conduct of the case to be paid out of the funds of the Florida House of Representatives.

SECTION 7. That the House Committee of Managers be and is hereby authorized to issue subpoenas and subpoenas duces tecum requiring appearance of witnesses and production of documents in further preparation, and for the impeachment trial, such witnesses to receive compensation as provided by law.

SECTION 8. These Articles of Impeachment shall take effect upon adoption.

(SEAL)

ATTEST: *Joe Brown*
Secretary of the Senate

And demand that you, Samuel S. Smith should answer the accusations as set forth in said Articles, and that such proceedings and judgments might be had as are agreeable to the law and justice.

You, Samuel S. Smith are therefore hereby summoned to be and appear before the Senate of the State of Florida, at their chamber, in Tallahassee, Florida, on the 18th day of May, 1978, at 9:00 o'clock, A.M., then and there to abide by, obey and perform such orders, directions and judgments as the Senate of the State of Florida shall make according to the Constitution and laws of the State of Florida, and at a time prior to that date, to file your written responsive pleadings in the manner and times as required by the Chief Justice of the Supreme Court of Florida.

Fail not.

WITNESS the Honorable Lew Brantley, President and presiding officer of the Senate at the City of Tallahassee, Florida, this 21st day of April, 1978.

Lew Brantley
President and presiding officer
The Florida Senate

(SEAL)

Attest: *Joe Brown*
Secretary, Florida Senate

NOTICE OF HEARING

To: The Honorable Samuel S. Smith
Circuit Judge, Third Judicial Circuit
4 Hillside Drive
Lake City, Florida 32055

It appearing from correspondence submitted to the Presiding Officer of The Florida Senate that the respondent desires a continuance and asserts that he is unable to obtain legal representation in these proceedings, it is therefore determined that a hearing is immediately necessary to enable the parties to present any issues relating to a continuance of the impeachment trial and the legal representation of the respondent, Samuel S. Smith.

NOTICE IS HEREBY GIVEN that a hearing will be held in the above-styled cause on these matters at the Supreme Court Building, Motion Room, Tallahassee, Florida, 32304, at 3:00 P.M., on Friday, April 28, 1978, before Chief Justice Ben F. Overton, Presiding Officer.

PLEASE GOVERN YOURSELF ACCORDINGLY.

DATED: APRIL 21, 1978

Ben F. Overton
Presiding Officer

(Certified copy of The Rules of Practice and Procedure when Sitting on the Trial of Impeachments was included.)

RETURN

RETURN OF John D. Melton, Sergeant at Arms, The Florida Senate

Received this Summons, Notice of Hearing dated April 21, 1978, attested copy of the Rules of Practice and Procedure of the Florida Senate when sitting in the Trial of Impeachment, precept, and an attested copy of HR 1560(1978) on the 21st day of April, 1978 and personally served and delivered an attested copy thereof upon Samuel S. Smith in New Orleans, Orleans Parish, Louisiana on the 24th day of April, 1978.

8:20 a.m. C.S.T.
John D. Melton
Sergeant at Arms
The Florida Senate

AFFIDAVIT

State of Florida
County of Leon

I, John D. Melton, do solemnly swear that this return made by me upon the process issued as stated above was made in the

manner as stated above and that I have performed the service as above described, so help me God.

John D. Melton
April 25, 1978

Sworn to and acknowledged before me this 25th day of April, 1978.

Faye W. McDaniel
Notary Public

REQUEST FOR CONTINUANCE

I, Samuel S. Smith, Respondent, respectfully request a continuance of all scheduled proceedings in the above-styled cause upon the following reasons:

1. For the reasons previously stated by letters of Joseph C. Jacobs, Esquire, and James O. Brecher, Esquire, the affidavit of Mr. Brecher, and the medical reports previously forwarded during previous proceedings in this cause;

2. For the reason of the criminal trial now proceeding in the Eastern District of Louisiana at New Orleans, Louisiana, and the pending legal issues raised by other court cases *(U.S. v. Smith et al,* case number 78-158, E.D.La.; *Williams et al v. Smith,* case number 52840, Sup. Ct. of Fla.; *Smith v. Henderson et al.,* case number 78-953, Cir. Ct. Leon Co.)

3. For the reason that my presence is required at New Orleans, Louisiana, for the continuing trial and, upon advice of my trial counsel in New Orleans, I am unable to be available to confer or to prepare for the above-styled trial or related proceedings, and that witnesses and evidence related to the above-styled cause will be unavailable in Florida because of the federal trial now proceeding.

4. So that determination may be made of my physical condition and when I may be physically able to tolerate another trial without irreparable damage to my health.

5. So that determination may be made for counsel to be appointed in my behalf, as I am indigent and have been found to be so by the federal court and the Florida House of Representatives and so that I may consult with any attorney appointed and obtain his legal advice as to the appropriate mode of procedure.

Dated this 26th day of April, 1978, at New Orleans, Orleans Parish, Louisiana.

Samuel S. Smith

MEMORANDUM

A hearing was held at 3:00 p.m. on April 28, 1978, by the undersigned as the presiding officer of these impeachment proceedings for the purpose of affording the respondent Samuel S. Smith an opportunity to present his arguments on his motions relating to his requests (1) for a continuance of the impeachment trial now set for May 18, 1978, and (2) that legal representation be provided for him in these proceedings.

The hearing date of April 28, 1978, was a time when the present ongoing trial of the respondent in the United States District Court in New Orleans was in recess. The respondent Samuel S. Smith failed to appear on April 28, 1978, but he did file a formal motion for a continuance and a request for appointment of counsel to represent him in these proceedings. This motion supplements previous letter requests addressed to both the President of the Senate and the undersigned as Chief Justice. Copies of the motion and the letters are attached as Exhibits A, B, and C.

There are certain facts and circumstances which must be considered in determining these motions.

First, it must be recognized that the primary purpose of these impeachment proceedings is to deny the respondent retirement benefits by bringing him within the purview of Section 121.091(5)(g), Florida Statutes, which provides as follows:

> Any elected official who is convicted by the Senate of an impeachable offense shall forfeit all rights and benefits under this chapter, except the return of his accumulated contributions as of the date of his conviction.

Second, the respondent Samuel S. Smith has filed a civil action in the Circuit Court of the Second Judicial Circuit, in Leon County, Florida. The amended complaint in this action asserts that respondent Samuel S. Smith is not an officeholder and is not subject to impeachment because of his "resignation, conviction, and retirement," and seeks a declaratory judgment determining that he is entitled to retirement benefits because he is no longer an officer subject to impeachment. Copies of the complaint and amended complaint are attached as Exhibit D. The respondent Samuel S. Smith is represented by private counsel in this circuit court action. Hearings on motions filed in this action have been scheduled for May 10, 1978. The same legal issue has been raised in these proceedings by the respondent in the letter dated April 13, 1978, addressed to the President of the Senate, which is attached as Exhibit B.

Third, with respect to the indigency of the respondent, I was advised by the representative of the Board of Managers of the House of Representatives at the hearing held on April 28, 1978, that the Select Committee of the House of Representatives made a finding that the respondent Samuel S. Smith was in fact indigent. No independent evidence of his indigency was presented by the respondent at the hearing on April 28, 1978.

Fourth, with respect to the trial of respondent in federal court, I have personally conferred with the United States District Judge presiding at the trial of the respondent in New Orleans, Louisiana, and he advises that the trial will be in session each working day through the month of May except for May 12, May 26, and May 29, 1978. No schedule of recess days has been established for June. The United States District Judge further advised me that the trial of respondent apparently will continue until the middle of July, 1978.

From these facts, this impeachment court must rule on the respondent's right to an appointed counsel in these proceedings and on his request for a continuance which directly relates to the question of whether there is a legal requirement that the respondent be present during the course of the impeachment proceedings.

Right to Counsel

You are advised that under the present state of the law, the appointment of counsel for an indigent at government expense is legally required only in those proceedings where imprisonment and, therefore, a deprivation of liberty are possible. Only the threat of the deprivation of liberty requires the appointment of counsel. *Argersinger v. Hamlin,* 407 U.S. 25 (1972); *In Re Gault,* 387 U.S. 1 (1967); *Gideon v. Wainwright,* 372 U.S. 335 (1963). Neither the threat of a fine, the threat of the revocation of a license, nor the threat of a suspension or disbarment has been held to require the appointment of counsel for an individual claiming to be indigent. *See, e.g., Woodham v. Williams,* 207 So. 2d 320 (Fla. 1st DCA 1968); *Ohio State Bar Association v. Illman,* 45 Ohio St. 2d 159, 342

N.E. 2d 688 (1976); *Bancroft v. Board of Governors*, 210 P. 2d 666 (Okla. 1949). These actions are held to be civil in nature, and to date there has been no requirement to provide counsel as a due process right in those instances by either the Supreme Court of Florida or the Supreme Court of the United States.

Clearly these impeachment proceedings cannot result in any imprisonment. The sole purpose of these proceedings is to deny the respondent retirement benefits since he no longer claims the office and asserts that he is willing to waive forever the right to hold or seek public office at any time in the future. In my view, revocation, suspension, and disbarment proceedings are analogous to these impeachment proceedings. Since appointed counsel is not legally required for indigents in those proceedings, it is my opinion that there is no requirement under the law, as it now exists, for counsel to be appointed for the respondent in these proceedings. It must be recognized, however, that failure of the respondent to have counsel in these proceedings could subject these proceedings to attack in either state or federal judicial actions, particularly in view of a finding of indigency by the House Impeachment Committee.

Recommendation

First, I would presently deny the request for an immediate appointment of counsel to represent the respondent. In my view, you should not ignore the fact that the identical legal issues concerning the validity of the respondent's resignation have been raised by respondent in both these proceedings and before the Circuit Court of the Second Judicial Circuit. The fact that the respondent has private counsel in the circuit court proceedings should not go unnoticed. Since counsel is representing the respondent in the circuit court action on the same issue, I see no reason why the same legal issues cannot be presented to this court of impeachment on May 26 or May 29, 1978. I therefore recommend that this Senate convene as a court of impeachment on either May 26 or May 29, 1978, to hear the legal issues raised by respondent concerning the validity of these proceedings because of his resignation. It is suggested that briefs on the issues of law should be filed by the respondent on or before May 18, 1978, and reply briefs by the Board of Managers of the House of Representatives on or before May 25, 1978.

In the event the Senate rejects the contentions on the law asserted by the respondent, the need for respondent to have counsel at a trial on the merits presents another problem. The present law, as I stated, does not require the appointment of counsel. To avoid a possible due process issue being subsequently asserted in either the state of federal courts and to comply with fundamental fairness, I would suggest that the Senate seek a means where representation may be provided for respondent in this portion of the trial through some form of legal services, i.e., Florida Legal Services, the Florida Bar, or other legal service entity that represents indigents in civil matters. Action to obtain such representation should begin immediately to facilitate an expeditious disposition of these proceedings.

A Continuance of These Proceedings To Ensure the Presence of Respondent

Rule 8 of the Rules of Practice and Procedure of the Florida Senate when sitting on the trial of impeachments provides in part as follows:

> . . . *If the impeached officer,* after service, *fails to* file timely responsive pleadings, or otherwise *appear* as may be directed in the summons, *the trial shall proceed,* nevertheless, *as upon a plea of not guilty* which plea may be entered by the Chief Justice for the impeached officer. If a plea of guilty is entered, judgment may be entered without further proceedings. The Chief Justice may, for good cause, extend the time set by the Senate for the impeached officer to file his responsive pleadings to the Articles of Impeachment, however, the Chief Justice shall not extend the time beyond that set by the Senate for the commencement of taking of evidence in the cause. [Emphasis supplied.]

Clearly the rules allow the Senate to proceed without the impeached officer being present. There is old federal precedent for holding an impeachment trial without an accused being present. This occurred in the United States Senate when it tried and convicted Federal District Judges John Pickering in 1803 and West H. Humphreys in 1862. *See* 3 *Hinds' Precedents of the House of Representatives,* §§ 2334, 2394 (1907). It should be noted, however, that due process requirements have changed substantially since those precedents were set. For example, during that era a defendant in a criminal trial was not entitled to testify in his own behalf. *See McCormack on Evidence,* at 142 (2nd ed. 1972).

Former Chief Justice Glenn Terrell, in his brief filed with the Florida Senate in a previous impeachment trial, stated that an impeachment trial is judicial in character and set forth the following due process rights to which an impeached officer is entitled in impeachment proceedings:

> . . . The respondent is entitled (1) to be informed of the nature of the charges against him; (2) he is entitled to the aid of counsel; (3) *to be confronted with the witnesses against him;* (4) to compulsory process of witnesses; (5) he cannot be compelled to be a witness against himself; (6) the rules of evidence observed in court trials are generally applicable; (7) a reasonable doubt of guilt must result in acquittal; (8) there must be showing of wrong intent, while one may be presumed to intend the necessary results of his voluntary acts, it is only a presumption and may not at all times be inferable from the act; (9) precedents have due weight and every other constitutional guaranty is accorded respondent. [Emphasis supplied.]

It is my conclusion that the law now requires that these proceedings be conducted at a time and in a manner so that the respondent can be present and confront witnesses when testimony on the merits is presented. It is my opinion that the rules of the Senate were written to allow a trial to continue without the respondent being present when the respondent had no justifiable excuse for his or her absence. Absence of the respondent because of a criminal trial in which he is a defendant is a justifiable excuse.

Recommendations

I recommend that in order to provide the respondent with an opportunity to confront witnesses, the trial on the merits where witnesses will testify and evidence will be presented should commence following the conclusion of the case of *United States v. Smith* now in progress in New Orleans, Louisiana. I have been advised by the Board of Managers of the House of Representatives that the number of witnesses they intend to present to the Senate will not, at this time, exceed five. Under these circumstances, it does not appear that the trial on the merits will take more than three to five days.

Although I have recommended a continuance of the trial on the merits until the respondent can be present, there is no requirement that the respondent be present when matters of law are being argued and presented in these impeachment proceedings or when his plea is entered unless he enters a plea of guilty.

Consequently, arguments on the law may proceed while the federal trial of the respondent is in progress as long as sufficient time to prepare the legal issues is allowed. Further, counsel could also enter the respondent's plea of not guilty immediately prior to arguments on the law. I see no legal impediment to proceeding on the issues of law pertaining to the validity of the resignation, particularly if a hearing on these issues is set on a date when the federal trial is in recess.

The respondent has also asserted his inability to undergo this impeachment trial because of a heart condition. The respondent did not appear or present any witnesses relative to his condition. He did submit letters from his treating physician. That condition has not caused the federal proceeding to be continued, and that assertion in these proceedings is presently without merit and should be rejected.

Summary

In summary, I recommend the following:

1. That the trial now set for May 18, 1978, be continued in a manner hereinafter provided.

2. That the Senate deny the appointment of counsel for the respondent on the issues of law concerning the validity of these proceedings. The Senate should consider requiring the respondent to enter his plea and to present argument on those issues of law on May 26 or May 29, 1978. Briefs on the issues of law should be filed by the respondent by May 18, 1978, and reply briefs by the Board of Managers of the House of Representatives should be filed by May 25, 1978.

3. That trial on the merits should be delayed until the conclusion of the United States District Court trial now in progress in New Orleans, Louisiana.

4. That, in the event the respondent has no counsel employed to represent him in the trial on the merits, the Senate should request representation for the respondent through some form of legal services that provide representation for indigents in civil cases, such as Florida Legal Services, the Florida Bar, or some other legal service entity.

Respectfully submitted,
Ben F. Overton
Chief Justice
Supreme Court of Florida

NOTICE OF PROCEEDINGS

To: The Honorable Samuel S. Smith
Circuit Judge, Third Judicial Circuit
4 Hillside Drive
Lake City, Florida 32055

and Atlantis Club Apartments
Building "H", 2501 Metairie Lawn Drive
Metairie, Louisiana 70002

also c/o Honorable James O. Brecher
1528A Harmony Street
New Orleans, Louisiana 70115

YOU ARE HEREBY NOTIFIED that The Florida Senate, sitting as a Court of Impeachment with the Chief Justice presiding, will convene at 9:00 A.M., Friday, May 12, 1978, in the new Senate Chambers, The Capitol, Tallahassee, Florida, for the purpose of receiving the recommendations and suggestions of the Chief Justice with regard to the Impeached Officer's Motions for Continuance and legal representation, and to conduct whatever other proceedings relating to the impeachment of Samuel S. Smith that may come before it:

PLEASE GOVERN YOURSELF ACCORDINGLY

DATED: May 5, 1978

Ben F. Overton
Presiding Officer

(SEAL)

Joe Brown
Secretary of the Senate

NOTICE OF APPEARANCE

COMES NOW the undersigned attorney and files his appearance as Counsel for The Board of Managers on the Part of the Florida House of Representatives Senate Impeachment Trial: Samuel S. Smith, Circuit Judge, Third Judicial Circuit.

Respectfully submitted,
Marc H. Glick
Counsel for the Board of Managers on the Part of the Florida House of Representatives

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Notice of Appearance has been furnished by U.S. Mail to Samuel S. Smith, Circuit Judge, Third Judicial Circuit, 4 Hillside Drive, Lake City, Florida 32055 and Atlantis Club Apartments, Building "H," 2501 Metairie Lawn Drive, Metairie, Louisiana 70002; James O. Brecher, Esquire 1528A Harmony Street, New Orleans, Louisiana 70115; and Joseph C. Jacobs, Esquire, Ervin, Varn, Jacobs, Odom & Kitchen, Post Office Box 1170, Tallahassee, Florida, 32302, this 8th day of May, 1978.

Marc H. Glick

LIMITED APPEARANCE

Comes now counsel for Samuel S. Smith and files this, his limited appearance, pursuant to the recommendation of the Honorable Ben F. Overton, Chief Justice, Supreme Court of Florida, heretofore filed.

This appearance is limited to the questions of jurisdiction and law referred to in the Chief Justice's report at page 8 and shall not be considered as a general appearance. [Exhibits V(1), V(4)]

The briefing schedule and schedule of presentation of argument in paragraph 2 of the summary of the Chief Justice at page 9 of his report will be complied with. [Exhibits V(1), V(4)]

This appearance shall not be construed as an appearance on the merits, whether the same is heard immediately or delayed until the conclusion of the trial in the United States District Court, now in progress.

Respectfully submitted,
Joseph C. Jacobs
Counsel for Respondent,
Samuel S. Smith, appearing specially
Tallahassee, Florida

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original hereof was filed with the President of the Senate and copies furnished by hand delivery to Honorable Ben F. Overton, Chief Justice, Supreme

Court of Florida, Tallahassee, Florida 32304; and Marc H. Glick, Counsel for the Board of Managers on the Part of the House of Representatives, Room 208 House Office Building, Tallahassee, Florida 32304, this 18th day of May, 1978.

Joseph C. Jacobs
Attorney

MOTION

Comes now Respondent Samuel S. Smith, by and through his undersigned counsel, appearing specially in his behalf, and moves the Senate sitting as a court of impeachment to dismiss the articles of impeachment heretofore filed herein and for grounds therefor says:

1. Respondent resigned his office of Circuit Judge on January 13, 1978, and is no longer an officer subject to impeachment pursuant to Article III, Section 17, Florida Constitution. (See Exhibits I and J.)

2. Respondent was removed from office upon his conviction for federal offenses which constitute a felony and is therefore no longer an officer subject to impeachment. (See Exhibits B, C, D, E, F and G.)

3. Respondent retired from the office of Circuit Judge on February 15, 1977, and is no longer an officer subject to impeachment. (See Supreme Court decision in case of Williams v. Smith, re Retirement, attached to Exhibit R(1).)

4. The proceedings before the Senate sitting as a court of impeachment are null and void and of no legal force or effect in that they violate Respondent's due process of law rights as guaranteed by Article I, Section 9, Florida Constitution, and the Fourteenth Amendment to the United States Constitution, as follows:

a. Respondent is indigent and adequate counsel has not been furnished to him for his defense (See Exhibits M(1), M(2) and M(3), Exhibit P.)

b. The proceedings have been scheduled and, in part, conducted at a time and under circumstances when Respondent was not able to be present in person and by counsel, and to advise his counsel in the presentation of his defense to the charges (Exhibits T(1) and T(5), Exhibits U and V.)

c. Respondent's health is presently such as to make it impossible for him to participate in these proceedings at this time and in the foreseeable future (Exhibits R and V).

Respectfully submitted,
Joseph C. Jacobs
Counsel for Respondent,
Samuel S. Smith, appearing
specially
Tallahassee, Florida

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original hereof was filed with the President of the Senate and copies furnished by hand delivery to Honorable Ben F. Overton, Chief Justice, Supreme Court of Florida, Tallahassee, Florida 32304; and Marc H. Glick, Counsel for the Board of Managers on the Part of the House of Representatives, Room 208, House Office Building, Tallahassee, Florida 32304, this 18th day of May, 1978.

Joseph C. Jacobs
Attorney

RESPONDENT'S BRIEF IN SUPPORT OF MOTION TO DISMISS ARTICLES OF IMPEACHMENT

IN RE: THE IMPEACHMENT TRIAL OF SAMUEL S. SMITH, CIRCUIT JUDGE OF THE THIRD JUDICIAL CIRCUIT OF THE STATE OF FLORIDA, ON ARTICLES OF IMPEACHMENT PREFERRED AGAINST HIM BY THE FLORIDA HOUSE OF REPRESENTATIVES.

STATEMENT OF THE CASE

Complaint for Declaratory Decree [Exhibit R(1)] was filed by former Circuit Judge Samuel S. Smith, on April 17, 1978, with attachments thereto as follows:

Exhibit A, unanimous slip sheet opinion of the Supreme Court of Florida, dated April 4, 1978, in *Williams v. Smith*;

Exhibit B, resignation of former Judge Smith, dated January 13, 1978;

Exhibit C, letter from Governor Askew to former Judge Smith, dated January 17, 1978;

Exhibit D, letter to Senate President Lew Brantley, dated April 13, 1978;

Exhibit E, letter from Dr. Landrum concerning the status of former Judge Smith's health, dated April 14, 1978.

Amendment to Complaint [R(1)] was thereafter filed on April 24, 1978, striking from paragraph 1 of the Complaint the phrase, "and for injunctive relief as may be necessary to supplement such declaratory relief."

Motion to Intervene [R(2)] was filed on behalf of the Governor and the Attorney General on May 2, 1978; Reply of Plaintiff to Motion to Intervene [R(3)] was filed the same day.

Notice of Hearing [R(5)] on all motions then pending was given on the same date, notifying parties of a hearing before Circuit Judge James E. Joanos on May 10, 1978.

STATEMENT OF THE FACTS

Respondent, Samuel S. Smith, was elected a circuit judge of the Third Judicial Circuit and became a member of the Florida Retirement System in January, 1961.

In 1972, Smith became a member of the Florida Retirement System's Elected Officers Class and participated in the system until his suspension. During this entire period he paid into the fund 6% of his gross salary as a circuit judge until July, 1963, and 8% of his gross salary thereafter.

On April 29, 1977, Smith was convicted of the following in the United States District Court for the Middle District of Florida:

". . . wilfully and knowingly combining, conspiring, confederating and agreeing with others, to commit an offense against the United States, that is, to distribute and cause to be distributed Marihuana, a Schedule I controlled substance under Title 21, United States Code, Section 812, and in furtherance of the conspiracy, the defendant and others performed certain overt acts as described in the indictment; and knowingly and intentionally possession with intent to distribute and causing to be distributed, approx. 1800 pounds of Marihuana, all in violation of 21 USC 841(1)(1) and 846, and 18 USC 2; as charged in Count 1 of indictment 77-14 Cr-J-R and Count 1 of indictment 77-14(S) Cr-J-R." (Exhibit C.)

Both of the above offenses are felonies as defined by 18 USC 2.

Smith was suspended from office without compensation by order of the Supreme Court of Florida rendered on June 30, 1977, and reported in 347 So.2d 1024, and said order reflects that Smith consented thereto. (Exhibit G.)

Smith has performed no judicial duties or other functions relating to his office since the date of his suspension and has received no compensation nor any retirement benefits.

On February 16, 1977, Smith submitted his application for disability retirement benefits under Section 121.091(4) of the Florida Retirement System Act. The State took no final action upon this application, but caused a suit to be filed which resulted in the Supreme Court decision (not yet final), copy of which is attached to the Complaint for Declaratory Decree [Exhibit R(1)] filed in the Circuit Court of the Second Judicial Circuit.

On January 13, 1978, Respondent resigned from office effective immediately and without reservation. Copy of the resignation is attached to the Complaint for Declaratory Decree [Exhibit R(1)].

On January 17, 1978, the Governor by letter purportedly declined to accept Smith's resignation, copy of which letter is attached to the Complaint for Declaratory Decree [Exhibit R(1)].

The House of Representatives of the State of Florida, as reported in Journal of the House on April 12, 1978, purportedly impeached Respondent [Exhibit Q].

The President of the Florida Senate and the Secretary of said Senate are conducting proceedings purportedly pursuant to Section 17 of Article III of the Constitution of Florida and trial had been scheduled for May 18, 1978.

Smith has written to the Senate President explaining the several problems facing him and has formally requested that the proceedings be deferred [Exhibit U].

The Complaint for Declaratory Decree prays for an order declaring Respondent's rights *only* and does not request any kind of injunctive relief. The prayer for relief is as follows:

"WHEREFORE, Plaintiff respectfully prays that this Court enter its order declaring that:

A. Plaintiff resigned on January 13, 1978, from office and is no longer an officer subject to impeachment.

B. In the alternative, Plaintiff was removed from office upon his conviction for federal offenses and is no longer subject to impeachment.

C. In the alternative, Plaintiff retired from office on February 15, 1977, and is no longer subject to impeachment.

D. That the proceedings in the Florida Legislature purporting to impeach and try Plaintiff are a nullity.

E. That in the event that the proceedings have some efficacy, that they violate Plaintiff's due process of law as guaranteed by Article I, Section 9, Constitution of Florida, in that:

(i) Plaintiff is indigent and adequate counsel has not been furnished to him for his defense and counsel;

(ii) The proceedings have been scheduled when he is not able to attend the proceedings;

(iii) His health is not such as to allow him to participate at this time.

F. Such other and further relief as the Court deems proper."

PREVIOUS LITIGATION RE SAMUEL S. SMITH

The State of Florida filed a Complaint for Declaratory Relief against Smith on or about July 1, 1977, alleging Smith's membership in the retirement system, his conviction and his application for disability retirement, and further alleging doubt as to the State's official duties with respect to the application for retirement benefits. This case resulted in a Final Summary Judgment as follows:

"2. That Article II, Section 8(d), Constitution of Florida, is not a self-executing provision of the State Constitution and, accordingly, said amendment, under the undisputed facts and circumstances of this case, does not operate to invoke a forfeiture of this Defendant's rights and privileges under the public retirement system of which he is a member.

"3. That this Court having reached the conclusion set forth in paragraph 2 above finds it unnecessary to treat any remaining issues raised by the pleadings.

"It is therefore, ORDERED AND ADJUDGED that Defendant's Motion for Summary Judgment be, and the same is hereby, granted and that Summary Final Judgment be, and is hereby, entered in favor of Defendant and against Plaintiffs. It is further ORDERED AND ADJUDGED that Plaintiffs' Motion for Summary Judgment be, and is hereby, denied."

The Supreme Court, in unanimous opinion filed April 4, 1978, affirmed this opinion in the following language:

"We, therefore, conclude that in adopting Article II, Section 8, the people intended that the amendment not be self-executing and that the Legislature should subsequently enact implementing laws to make it workable and effective and to carry out the intent expressed in the opening sentences of the amendment:

'A public office is a public trust. The people shall have the right to secure and sustain that trust against abuse . . . .'

The judgment of the Circuit Court is affirmed." (Footnotes omitted) [Exhibit R(1)]

Although technically the above decision is not final because a Petition for Rehearing has been timely filed and not disposed of, the case, insofar as Smith is concerned, is over and final due to the fact that the State's Petition for Rehearing is limited to the opinion's effect on issues not involving Smith and the said Petition for Rehearing admits the decision's accuracy as relates to Smith.

IMPEACHMENT PROCEEDINGS RE SMITH

The House of Representatives, as reported in the Journal of the House on April 12, 1978, (Exhibit Q) purportedly impeached Respondent. Respondent filed a request for continuance (Exhibit U). The Chief Justice thereafter recommended the following:

1. The trial theretofore set for May 18, 1978, be continued.

2. The Senate sitting as a court of impeachment deny the appointment of counsel requested by Respondent.

3. That issues of law be subject to briefs and oral argument before the Senate.

4. Trial on the merits be delayed until the conclusion of the Federal District Court trial in progress in New Orleans.

5. Senate request representation for the Respondent through some form of free legal services. (Exhibit V(1).)

The Special Committee on Impeachment Rules received the recommendation which was amended on the floor and approved as follows:

1. The motion for appointment of counsel was denied.

2. The trial set for May 18, 1978, was continued.

3. Court of Impeachment meet on May 26, 1978, to consider all issues submitted by the Chief Justice and to set a trial date. Trial date to be set at a reasonable time after the expected conclusion of the Federal court trial now pending in New Orleans.

4. Special Committee on Impeachment Rules to meet prior to May 26, 1978, to receive and act upon the recommendations of the Chief Justice. (Exhibit V(4).)

Respondent filed his Limited Appearance and Motion to Dismiss, raising the following questions:

1. Respondent resigned his office of Circuit Judge on January 13, 1978, and is no longer an officer subject to impeachment pursuant to Article III, Section 17, Florida Constitution.

2. Respondent was removed from office upon his conviction for federal offenses which constitute a felony and is therefore no longer an officer subject to impeachment.

3. Respondent retired from the office of Circuit Judge on February 15, 1977, and is no longer an officer subject to impeachment.

4. The proceedings before the Senate sitting as a court of impeachment are null and void and of no legal force or effect in that they violate Respondent's due process of law rights as guaranteed by Article I, Section 9, Florida Constitution, as follows:

a. Respondent is indigent and adequate counsel has not been furnished to him for his defense;

b. The proceedings have been scheduled and, in part, conducted at a time and under circumstances when Respondent was not able to be present in person and by counsel, and to advise his counsel in the presentation of his defense to the charges;

c. Respondent's health is presently such as to make it impossible for him to participate in these proceedings at this time and in the foreseeable future.

FLORIDA AUTHORITIES

The threshold question is whether Smith is a public officer, liable to impeachment. He was convicted of a felony, suspended from office without pay, resigned effective immediately and without reservation and, it is argued, is not liable to impeachment.

Article III, Section 17, Constitution of Florida, is as follows:

"Section 17. Impeachment.—

(a) The governor, lieutenant governor, members of the cabinet, justices of the supreme court, judges of district courts of appeal and *judges of circuit courts shall be liable to impeachment for misdemeanor in office.* The house of representatives by two-thirds vote shall have the power to impeach *an officer.* The speaker of the house of representatives shall have power at any time to appoint a committee to investigate charges against *any officer subject to impeachment.*

(b) *An officer* impeached by the house of representatives shall be disqualified from performing any official duties until acquitted by the senate, and unless the governor is impeached he may by appointment fill the office until completion of the trial.

(c) All impeachments by the house of representatives shall be tried by the senate. The chief justice of the supreme court, or another justice designated by him, shall preside at the trial, except in a trial of the chief justice, in which case the governor shall preside. The senate shall determine the time for the trial of any impeachment and may sit for the trial whether the house of representatives be in session or not. The time fixed for trial shall not be more than six months after the impeachment. During an impeachment trial senators shall be upon their oath or affirmation. *No officer* shall be convicted without the concurrence of two-thirds of the members of the senate present. Judgment of conviction in cases of impeachment shall *remove the offender from office* and, in the discretion of the senate, may include disqualification to hold any office of honor, trust or profit. Conviction or acquittal shall not affect the civil or criminal responsibility *of the officer.*" (Emphasis supplied)

The underlined [italicized] provisions make it *abundantly clear that the power of impeachment is limited to officers.*

In 1918, *State ex rel. Jackson v. Crawford,* 79 So. 873, held that the acceptance by the Governor of a resignation of a suspended officer was what created a vacancy in the office.

This case is distinguished from the case *sub judice* as follows:

1. It would be reversed by the 1968 Constitution as construed by the Florida Supreme Court in the case of *Spector v. Glisson,* 305 So.2d 777 (Fla. 1974), in the following language:

"Now, however, the current 1968 constitutional provision controls and also takes precedence over statutes such as Fla. Stat. § 114.01 providing that an office shall be 'deemed vacant' in cases there enumerated, one being 'resignation.' The provisions of Ch. 100 with regard to the filling of vacancies are supplementary only to the controlling constitutional requirement. Thus, absent a specific provision in the 1968 Constitution as to judges (as there is in Art. V, §§ 10 and 11 regarding the manner of filling the vacancy) the general provision must apply, that a vacancy 'shall occur' upon 'resignation'."

2. This case can be distinguished from the case *sub judice* by the facts. In the *Jackson* case effort was made to circumvent the will of the electorate by filing a resignation to create a vacancy. The two questions which the Court answered in the affirmative were: can a vacancy be created by the acceptance by the Governor of a resignation of a suspended official and the commissioning of another person until qualification of the successor to the suspended officer is chosen at the ensuing general election is satisfactory evidence of the acceptance by the Governor of the resignation.

The Court simply found that if acceptance by the Governor were necessary it could be either oral or in writing, or could be shown by the performance by the Governor of appointing a successor and specifically did not pass upon the question of the right of an officer under suspension to surrender his office

by resignation without its acceptance, express or implied, by the Governor.

1934: *In re Advisory Opinion to the Governor*, 158 So. 441. This case stands for the proposition that a resignation to take effect at a subsequent date, the office does not become vacant until the date becomes effective.

1. This case was conclusively reversed by *Spector* and is an advisory opinion which cannot be cited as binding authority on the Court in subsequent cases.

1938: *State ex rel. Landis v. Heaton*, 180 So. 766, stands for the proposition that resignation, coupled with abandonment of the office, is effective without regard to the acceptance or rejection thereof by the Governor.

"His reasons for resigning are immaterial. The fact is that he has exercised the right to resign and, having resigned in due and lawful form and abandoned the office, the office is vacant and may be filled by appointment by the Governor.

"It is contended in the demurrer that it is not alleged in the answer of Britton that his resignation has been accepted by the Governor and it is also contended that until accepted by the Governor the alleged resignation of Britton is wholly ineffective. We cannot agree with this contention because the answer not only alleges the resignation, but also the abandonment of the office. When Britton resigned and abandoned the office, he did all that he could do, and all that is required to do, to divest himself of his official character."

1939: *State ex rel. Gibbs v. Lunsford*, 192 So. 485. This case seems to hold that the resignation became effective only when it was accepted by the Governor.

1. Again, this is reversed by *Spector*.

2. It is distinguished from the present case on the facts. This was another attempt to use the tender of a resignation sent from Panama City on November 7th to create a vacancy to be filled by an election on November 8th, when the same was not received by the Governor's office and could not have been known until November 9th, when it was received and accepted by the Governor. The Court avoided the obvious inequities which would have resulted had the resignation been effective when it was dated.

The Attorney General's opinions here, as in *Spector*, are reversed by the Court's opinion therein.

CASES FROM OTHER JURISDICTIONS

In *State ex rel. Landis v. Heaton, supra*, the Florida Supreme Court cited with favor the Supreme Court of Alabama in the case of *State v. Fitts*, 49 Ala. 402:

"An unconditional resignation of a public office, to take effect immediately, cannot be withdrawn, even with the consent of the power authorized to accept it, and it does not seem to be material that the resignation had not been accepted. State v. Fitts, 49 Ala. 402; 23 Am. and Eng. Ency. Law, 424. A contingent or a prospective resignation, however, can be withdrawn at any time before it is accepted. 29 Cyc. 1404. There are some authorities, however, holding that a resignation of a public office does not take effect until an acceptance, among which will be found the leading case of State v. Clayton, 27 Kan. 442, 41 Am.Rep. 418. But our court has, by the Fitts Case, supra, become committed to the doctrine that an acceptance is not necessary when the resignation is unconditional and goes into effect immediately."

and thereafter cited the following jurisdictions where it has been held that acceptance of resignation is unnecessary to create a vacancy, to-wit:

"California	People v. Porter, 6 Cal. 26.
Indiana	Leech v. State, 78 Ind. 570.
Iowa	Gates v. Delaware County, 12 Iowa 405.
Nebraska	State v. Lincoln, 4 Neb. 260.
Nevada	State v. Clarke, 3 Nev. 566; State v. Beck, 24 Nev. 92, 49 P. 1035.
New York	Olmstead v. Dennis, 77 N.Y. 378; Conner v. New York, 2 Sandf. 355, 4 N.Y. Super. Ct. 355, affirmed 5 N.&. 285
Ohio	Reiter v. State, 51 Ohio St. 74, 36 N.E. 943, 23 L.R.A. 681
Missouri	State v. Bus, 135 Mo. 325, 36 S.W. 636, 33 L.R.A. 616.
Federal	U.S. v. Justices, C.C., 10 F. 460."

These cases have been Shepardized and continue to be authority for the proposition cited by the Supreme Court.

In addition to these cases, counsel's research indicates the following cases would seem to generally support this conclusion, to-wit:

People ex rel. Rosenberg v. Keating, 144 P.2d 992 (Col. 1944). *State ex rel. Kleinsteuber v. Kotecki*, 155 Wis. 66, 144 N.W. Rep. 200.

Cole v. McGillicuddy, 21 Ill.App. 3d 645; 316 N.E.2d 109.

Meeker v. Reed, 232 P. 760

Vito v. DiCarlo, 275 N.Y.S.2d 412.

State v. Appling, 334 P.2d 482.

A history of litigation in this area was covered in detail in the Nebraska case of *State of Nebraska v. Hill and Benton*, 37 Neb. Rep. 80, dated in 1893.

IMPEACHMENT IN FLORIDA

The recent history of Impeachment in Florida by Frederick B. Karl and Marguerite Davis is most helpful in this matter. This reveals that impeachment proceedings in varying degrees of completion were always stopped on the resignation of the officer involved. In 1871, Judge James T. Magbee resigned his office and the House managers moved that the impeachment be dissolved, which motion was granted. In 1897, Treasurer Clarence B. Collins resigned and the House of Representatives withdrew the articles of impeachment and notified the Senate of that action. In April, 1974, a Select Committee of the House discontinued further action against Floyd T. Christian when he resigned from office.

In 1975, Tom O'Malley resigned from office as Treasurer and the articles of impeachment against him were dismissed.

In 1975, a Select Committee of the House discontinued activity on the resignation of Justices Dekle and McCain.

Thus, it is found that no officer in the State of Florida has to this date been impeached after his resignation.

IMPEACHMENT — UNITED STATES

Following are excerpts from paragraphs 458 and 459 of Chapter CXCIII, Nature of Impeachment, Precedents of the U. S. House of Representatives:

"458 . . . . No useful information on this subject can be obtained from the English precedents, because in England a

private citizen could be impeached as well as officers of the Government.

"In this country there have been two attempts to impeach persons who had ceased to be officers for acts done by them while they were officers. One of these cases was that of William Blount in 1798; the other that of William W. Belknap in 1876.

"In Blount's case when he was called upon to answer the articles he filed a plea which set up in substance these two defenses: (1) That a Senator is not impeachable, and (2) that he had ceased to be a Senator. (3 Hinds' Precedents, 663.)

"This double plea was sustained by the Senate by a vote of 14 to 11. (3 Hinds' Precedents, 679.)

"There is nothing in the record of the case to enable us to determine whether all the 14 Senators who voted to sustain the plea did so becasue they held that a senator is not impeachable, or because Blount was out of office at the time. And, of course, it may be that some voted to sustain the plea on one of those grounds and some on the other.

"It will be seen that the managers in that case actually contended that in the United States, as in England, private persons may be impeached as well as officers. It is not thought necessary to consider that question, because that contention has never been made since it was made by the managers in Blount's case. Mr. Ingersoll, of counsel for Blount, said in the course of the argument that he would not contend that an officer might escape an impending impeachment by resigning his office for that purpose.

"This admission of Mr. Ingersoll's gave great comfort to the managers and some embarrassment to the counsel for the respondent in Belknap's case. In that case the respondent filed a plea in which he averred:

> 'That this honorable court ought not to have or take further cognizance of the said articles of impeachment * * * because he says that before and at the time when the said House of Representatives ordered and directed that he, the said Belknap, should be impeached at the bar of the Senate, and at the time when the said articles of impeachment were exhibited and presented against him * * * he, the said Belknap, was not, nor had he since been, nor is he now, an officer of the United States; but at the said times was, ever since had been, and now is, a private citizen of the United States and of the State of Iowa. (3 Hinds' Precedents, 919.)'

To this plea the managers for the House of Representatives filed a replication, in which they set up: (1) That at the time the acts charged in the articles of impeachment were committed, Belknap was Secretary of War; and (2) that Belknap had resigned to escape impeachment, after he had learned that the House of Representatives, by its proper committee, had completed its investigation into his official conduct, and was considering the report it should make to the House upon the same. There were further pleadings, but those above stated set forth sufficiently what the issues were. (3 Hinds' Precedents, 921.)

"Belknap was called upon to plead to the merits, but declined to do so on the ground, as set forth on the record by his counsel, that, as less than two-thirds of the Senate had sustained the jurisdiction, the respondent was entitled to be discharged, without further proceedings. (3 Hinds' Precedents, 936-937.)

"The Senate, however, went on and took evidence in the case, with the result that Belknap was acquitted. The vote on the several articles ranged from 35 to 37 for conviction. On each article, 25 voted not guilty. Most of those who voted not guilty stated that they did so because they believed the court was without jurisdiction, for the reason that the respondent had ceased to be a civil officer of the United States at the time he was impeached by the House of Representatives.

"Hence, in Belknap's case, as in Blount's case, it will be seen that the final vote does not indicate that any of the Senators who voted 'guilty' did so on the ground that one who has been a civil officer remains liable to impeachment as long as he lives, for acts done during the time he held the office. The evidence in the case showed that Belknap was advised at 10 o'clock of the morning of the day that he resigned, that the Judiciary Committee of the House was about to report a resolution recommending his impeachment. He hurried to the President, tendered his resignation, and had it accepted, a few hours only before the Judiciary Committee did present to the House the resolution recommending his impeachment. There was much controversy in the discussion of the case before the Senate by the managers and council, respectively, as to whether Belknap was an officer when the resolution of impeachment was presented to the House, on the theory that the law takes no notice of fractions of a day. But, aside from this, it was strenuously contended by the managers that even if the general rule be that an officer ceases to be subject to impeachment when he leaves the office, there should be an exception to that rule when the officer resigns for the very purpose of escaping impeachment.

"It is impossible to determine what proportion of the Senators who voted against Belknap at the conclusion of the trial did so on the ground that he could not escape impeachment by resigning for that purpose, even if he would not be subject to impeachment had he not vacated the office in that way and for that purpose. In other words, the case is not a precedent for the proposition that one whose term of office has expired remains subject to impeachment during the whole of his life for acts done while he held the office.

"When Manager Hoar was making his argument a Member of the Senate interrupted him and propounded the following question:

> 'There are no doubt several Members of the Senate who have been in past years civil officers of the United States. Are they liable to impeachment for an alleged act of guilt done in office?'

"The manager did not flinch at this question, but said, as he was evidently required to say or abandon his contention: 'The logic of my argument brings us to that result.'

"It will be seen that the contention which was made on behalf of the House in Belknap's case, and which we understand is maintained by the managers in the case at bar, is far-reaching. The present President of the United States at one time held the office of Solicitor General; at another time he was governor of the Philippine Islands; at another time he was Secretary of War. Is it possible that he can now be the subject of impeachment for any act committed by him at the time he held either one of those offices? If so, he may be removed from his present office as President of the United States by a majority of the House and two-thirds of the Senate for alleged offenses charged to have been committed while he held any one of the other positions above mentioned.

"And so of any other public man who has ever held office under the United States.

"It would seem that a contention which leads to such absurd results cannot be sustained.

"459. On January 9, 1913, in the Senate sitting for the Archbald impeachment trial, Mr. Manager George W. Norris, of Nebraska, said in concluding argument:

'The authorities are practically unanimous that a public official can be impeached for official misconduct occurring while he held a prior office if the duties of that office and the one he holds at the time of the impeachment are practically the same, or are of the same nature. The Senate must bear in mind, as stated by all of the authorities, that the principal object of impeachment proceedings is to get rid of an unworthy public official. In the State of New York it was held in the Barnard case that the respondent could be impeached and removed from office during his second term for acts committed during his first term. And in the State of Wisconsin the court held the same way in the impeachment of Judge Hubbell. To the same effect was the decision in Nebraska upon the impeachment trial of Governor Butler. On this point the respondent relies upon the case of the State v. Hill. (37 Nebr., p. 80).

In that case the State treasurer of Nebraska was impeached after he had completed his term and retired to private life. The articles of impeachment were not passed on by the legislature—in fact, were not even introduced in the legislature—until after the respondent had served his full term, and the court there held that impeachment did not lie, but it expressly approved the judgment of the New York court in the Judge Barnard case, the judgment of the Wisconsin court in the Judge Hubbell case, and the prior judgment of the Nebraska court in the Butler case."

IMPEACHMENT TRIALS IN THE UNITED STATES SENATE

A concise statement of the general character of the several impeachment trials which have been heretofore conducted by the Senate of the United States:

IMPEACHMENT OF WILLIAM BLOUNT

William Blount, a Senator from Tennessee, was impeached in 1797, on a charge of conspiracy to create, promote, and set on foot within the jurisdiction of the United States, and to conduct and carry on from thence, a hostile military expedition against the territories and dominions of Spain in Florida and Louisiana for the purpose of wrestling such territories from Spain and conquering the same for Great Britain, with which Spain was at war; conspiring to incite the Creek and Cherokee Nations of Indians to commence hostilities against the subjects of Spain in violation of the then existing treaty between the United States and Spain, and conspiring to alienate the confidence of these Indian tribes from the principal agent of the United States appointed by the President, in accordance with law, to reside among the tribes; conspiring to seduce the official interpreter appointed by the United States to reside among the said Indian tribes from the duty and trust of his appointment, and conspiring to impair the confidence of the Cherokee Nation in the United States and create discontent among the Indians relative to the ascertainment of the boundary line of the United States and the Cherokee Nation under twenty provisions.

"Shortly after Blount had been impeached by the House he was expelled by the Senate, and he was thereafter acquitted of the impeachment on the ground that he was not a civil officer of the United States.

IMPEACHMENT OF WILLIAM W. BELKNAP

"In 1876 William W. Belknap, Secretary of War, was impeached on five articles, charging that he had accepted a portion of the profits of an Army post tradership from a post trader whom he had appointed while he held the War portfolio. A few hours before the House formally adopted the articles of impeachment against him, Belknap resigned as Secretary of War and the President accepted his resignation. His counsel interposed a plea to the jurisdiction in the Senate on the ground that the respondent was not a civil officer of the United States at the time of his impeachment. This plea was overruled by a majority of less than two-thirds and the trial proceeded. The respondent was ultimately acquitted by the votes of the Senators who had originally voted in favor of the plea to the jurisdiction."

Thus it is seen that no former officer who has resigned has ever been impeached in the United States.

The most recent authority for the proposition that national officers will not be impeached following their resignation is the resignation of the Vice President of the United States and of the President of the United States, respectively, and the subsequent discontinuation of any action against these individuals by impeachment.

DUE PROCESS

To require Smith to come to Florida and defend himself in an impeachment proceeding at this particular time would violate his due process rights, guaranteed by both the State and Federal Constitutions. As is demonstrated by the documents filed with the Florida Legislature, it conclusively appears:

1. Smith has been declared to be indigent by both the Federal courts and the Committee of the House of Representatives and is unable to obtain counsel.

2. Smith is presently engaged in the defense of a complex criminal charge in the Federal District Court in New Orleans, Louisiana, a distance of approximately 400 miles from Tallahassee. His appointed counsel in that case has filed an affidavit with the Legislature setting out the facts of that case in which he states that it involves a 12-count indictment in which Smith is charged in four counts; that the government has conservatively estimated that it will call approximately 200 witnesses and that trial will last four months; that Smith is required in New Orleans at all stages of the trial proceedings; and that the demands of preparation and the trial of the action make Smith unavailable to participate in any other proceedings elsewhere until the conclusion of the trial in New Orleans.

3. The health of Mr. Smith is called into question by the reports of his physicians filed with the Legislature indicating the high desirability of a delay between court proceedings as a necessity to Mr. Smith's health.

IF SECTION 114.01(d) BE CONSTRUED TO REQUIRE THE ACCEPTANCE OF THE RESIGNATION OF THE OFFICER BY THE GOVERNOR, THEN THE SAME PROVIDES FOR AN UNLAWFUL DELEGATION OF AUTHORITY TO THE EXECUTIVE BRANCH OF GOVERNMENT.

Section 114.01(d) as amended effective June 16, 1977, is as follows:

"(d) Upon the resignation of the officer and acceptance thereof by the governor."

If the statute be construed to require acceptance by the Governor as a condition precedent to its being effective, then the same is, of course, directly contrary to the Florida Supreme Court decision in the case of *Spector v. Glisson, supra.*

It cannot be questioned that the intent of the Legislature was to place in the Governor the power to accept resignations and the question is whether or not such power was *validly* delegated to the Governor.

The statute is clearly contrary to Article X, Section 3, Florida Constitution, which defines vacancy in office as:

"Vacancy in office shall occur upon the creation of an office, upon the death of the incumbent or his removal from office, resignation, succession to another office. . ."

The Constitution's providing the method by which a vacancy occurs has precluded the Legislature from making any other condition a condition precedent to a vacancy.

The statute is likewise defective for lack of legislative guidelines and standards. If the Governor seeks to exercise the power, what is the standard by which his exercise of the power will be measured? In *Delta Truck Brokers, Inc. v. King,* 142 So. 2d 273 (Fla. 1962), the Supreme Court struck down a broad statutory grant of power which was without acccompanying legislative standards and noted:

"The Legislature may, of course, delegate the performance of certain functions to administrative agencies provided that in doing so it announces adequate standards to guide the ministerial agency in the execution of the powers delegated. . . It is essential that the act which delegates the power likewise defines with reasonable certainty, the standards which shall guide the agency in the exercise of the power."

In *Dickinson v. State,* 227 So.2d 36 (Fla. 1969), the Supreme Court found that the effect of the statute there involved was to confer upon the Comptroller the power to grant approval to one applicant yet withhold arbitrarily approval from another, without guidelines or accountability. Most of the cases, such as *Drexel v. City of Miami Beach,* 64 So.2d 317 (Fla. 1953), *Permenter v. Younin,* 31 So.2d 387 (Fla. 1947), *Brouch v. Young,* 100 So.2d 411 (Fla. 1958), *Godshalk v. City of Winter Park,* 95 So.2d 9 (Fla. 1957) dealt with vague or subjective standards which were arguably within the constitutionally permissible guidelines.

The District Court of Appeal, First District, has most recently in the case of *Askew v. Postal Colony,* held that the establishment of laws must come from the Legislature and not from an administrative agency. In that case the Governor and Cabinet were the subject of the Court's order. In its decision the First District Court followed the mandate of the Supreme Court in *Lewis v. Bank of Pasco County,* 346 So.2d 53 (Fla. 1977). The same arguments made by the State here were made by the Comptroller in that case. The Court held:

"This Court had held in a long and unvaried line of cases that statutes granting power to administrative agencies must clearly announce adequate standards to guide the agencies in the execution of the powers delegated. The statute must so clearly define the power delegated that the administrative agency is precluded from acting through whim, showing favoritism, or exercising unbridled discretion. Dickinson v. State, 227 So2d 36 (Fla. 1969); Conner v. Joe Hatton, Inc., 216 So.2d 209 (Fla. 1968)." *Lewis v. Bank of Pasco County, supra,* at 55.

The Court did not hold that bank shareholders lists could not be required to be disclosed by the Legislature. The Court required the Legislature to provide the safeguards to preclude favoritism, whim and unbridled discretion.

Here too is a situation where the Legislature has not provided the protection to preclude abuse. There is nothing wrong with the purpose for which the Legislature strives. But the means it uses do not protect the citizens of Florida from abuse.

The Legislature in Section 114.01(d) has delegated to the Governor the authority to accept a resignation when and if he chooses to do so. In *Conner v. Joe Hatton, Inc.,* 216 So.2d 209 (Fla. 1968), it is said:

"Most often quoted is the principle laid down by Mr. Justice Whitfield in State v. Atlantic Coast Line Railway Co., 1908, 56 Fla. 617, 47 So. 969, 32 L.R.A., N.S., 639 as follows:—

'The Legislature may not delegate the power to enact a law or to declare what the law shall be, or to exercise an unrestricted discretion in applying a law; but it may enact a law, complete in itself, designed to accomplish a general public purpose, and may expressly authorize designated officials within definite valid limitations to provide rules and regulations for the complete operation and enforcement of the law within its expressed general purpose.' 47 So. at p. 976.

"It has been said that the true distinction is between the delegation of power to make the law, which necessarily involves a discretion as to what the law shall be, and the conferring of authority or discretion in executing the law pursuant to and within the confines of the law itself. See Ex Parte Lewis, 1931, 101 Fla. 624, 135 So. 147, 151, quoting with approval Hampton, Jr., & Co. v. United States, 276 U.S. 394, 400, 48 S. Ct. 348, 351, 72 L.Ed. 624.

"*When the statute is couched in vague and uncertain terms or is so broad in scope that no one can say with certainty, from the terms of the law itself, what would be deemed an infringement of the law, it must be held unconstitutional as attempting to grant to the administrative body the power to say what the law shall be.* See State ex rel. Davis v. Fowler, 1927, 94 Fla. 752, 114 So. 435, 437; and Lewis v. Florida State Board of Health, Fla. App. 1962, 143 So. 2d 867, 875. As stated in 1 Fla. Jur., Administrative Law, at page 243, 'A law must be complete in itself, in all its terms and provisions when it leaves the legislative branch of government, so that by appropriate judicial review and control any action taken pursuant to such delegated authority may be kept within the defined limits of the authority conferred and within the express and implied limitations of all controlling provisoins and principles of dominant law, and it is not left to an administrative authority to decide what should and what should not be deemed infringement of the law.' " (Emphasis supplied) *Conner v. Joe Hatton, Inc., supra,* at 211, 212.

See also, *Sarasota County v. Barg,* 302 So.2d 737 (Fla. 1974); *Mahon v. County of Sarasota,* 177 So.2d 665 (Fla. 1965).

The most recent and best reasoned opinion on this subject was *Lewis v. Bank of Pasco County, supra,* which originated in one of the last of the outstanding opinions rendered by former Circuit Judge Hugh M. Taylor and in which the Supreme Court said:

"There are no restrictions, limitations, or guidelines provided in the statute to limit or regulate the action of the department in granting a [sic] withholding consent to the news

media inspecting, copying and publishing any information in a bank's records. As the statute is written, the Department may release the financial statements of some borrowers, the bank balances of others and the stock holdings of others entirely at the whim or caprice of the Comptroller. The fact that, as of the present time, the Comptroller has attempted to exercise such authority only as to stock holdings in banks is immaterial. The validity of the power sought to be vested in the Comptroller must be measured by the scope of the grant of power, not the extent to which it has been exercised." *Lewis v. Bank of Pasco County*, supra, at 55.

In the case before the Senate there is no guideline, nor can one be found in any legislation which may be read in pari-materia, or in any rules or regulations of other agencies or authorities, State or Federal. If the Governor has the power to accept, he has the power to reject. If he has the power to reject in order to subject a former public officer to impeachment, then he has the power to accept the resignation and, therefore, relieve the former public officer from impeachment at his whim. Examples of the possible misuse of this power by a chief executive are legion.

Section 99.012, Florida Statutes, provides that no individual may qualify as a candidate for public office who holds another elected or public office, whether county, state or municipal, the term of which or any part thereof, runs concurrently with the term of office for which he seeks to qualify, without resigning from such office in less than ten (10) days prior to the first day of qualifying for the office he intends to seek. If the Governor has the right to render ineffective an unqualified resignation of a public officer who desires to resign as required by law in order to run for another office, the Governor could effectively prevent such officer from qualifying as a candidate for the other office to which he aspired by the mere expedient of refusing to accept his resignation from the office he occupies. Such rejection of the officer's resignation, with or without cause by the Governor, would require that the officer continue in the office he occupies from which the law requires that he must resign before qualifying for any other elected office. To illustrate, if the Governor announced his intention to run for a second term he could foreclose any opposition by any other public officer who might desire to run against him by merely refusing to accept that officer's resignation from the office he occupied. The Governor could also use this device of rejecting the resignation of a public officer in order to keep such officer from resigning and running against another candidate favorable to the Governor.

Article II, Section 8, of the Florida Constitution as amended in 1976, requires that all elected public officers file each year with the Secretary of State a report making a full and public disclosure of their financial interest at the time and in the manner provided by law. Failure to comply with this constitutional requirement, and the rules promulgated by the Florida Ethics Commission, constitutes a misdemeanor and calls for the punishment prescribed by statute. If the Governor has the right to render ineffective an unqualified resignation of a public officer who desires to resign his office rather than comply with the financial disclosure requirements as mandated by the Constitution, the Governor could effectively preclude such resignation by refusing to accept it, thereby forcing the public official to remain in office against his will and either comply with the financial disclosure law or else be prosecuted and penalized for the commission of a misdemeanor.

Thus, if the statute be construed to authorize the Governor to accept certain resignations and reject others, the same would constitute an unlawful delegation of legislative authority and be of no force and effect.

The Supreme Court of Florida in 1934, in *State ex rel. Hardie v. Coleman*, 155 So. 129 (Fla. 1934), speaking of the power of the Governor to suspend and the Senate to remove a public officer, stated the respective authority of the Executive and Judicial branches of government as follows:

"The power of the Governor to suspend and of the Governor and the Senate to remove is not an arbitrary one. Both are guarded by constitutional limitations which should be strictly followed. It has been charged that this is an unusual power to vest in the Governor and the Senate, and so it is, but the people have lodged it there. The Position of Governor and Senator is one vested with great dignity and responsibility and we are not to presume that these places will be filled by the people with men who do not measure up to the responsibility imposed in them. At any rate the duty imposed should be exercised with great care and caution because, when done, the result is final as no other power is authorized to interfere.

"We therefore conclude that this court is authorized to determine the sufficiency of the jurisdictional facts on which the Governor rests any suspension under section 35 of article 4 of the Constitution, but we have no authority to determine the sufficiency of the evidence to support the grounds of such suspension, that being solely a function of the Senate under such rules as it may prescribe."

The principle of law enunciated above is dispositive of the issue presented in this case.

ARTICLE III. SECTION 17(C), ARGUMENT AS TO EXCLUSIVITY OF PUNISHMENT UPON CONVICTION OF IMPEACHMENT.

Article III, Section 17(c), provides in part:

". . . judgment of conviction in cases of impeachment shall remove the offender from office and in the discretion of the Senate may include disqualification to hold any office of honor, trust or profit. Conviction or acquittal shall not affect the civil or criminal responsibility of the officer."

In view of the fact that the Constitution provides the penalty (1) removal from office, (2) discretionary disqualification to hold other office, it indirectly prohibits the Legislature from providing any other or additional penalty.

The one exception to the above rule would be "civil or criminal responsibility" which the Constitution specifically preserves, regardless of conviction or acquittal. This again supports the basic premise, as the drafters of this section of the Constitution must have reached the conclusion that had they not so provided, then the conviction or acquittal would affect the civil or criminal responsibility of the officer. Further, the penalty being provided and no mention being made of impeachment affecting the officer's pension, would indicate an intention not to include, and therefore, to prohibit such punishment.

CONCLUSION

In light of the above statutes and authorities, it is respectfully submitted that Respondent's Motion to Dismiss filed herein should be granted.

Respectfully submitted,
JOSEPH C. JACOBS
Counsel for Respondent,
Samuel S. Smith,
appearing specially
Tallahassee, Florida

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original hereof was filed with the President of the Senate and copies furnished by hand delivery to Honorable Ben F. Overton, Chief Justice, Supreme Court of Florida, Tallahassee, Florida 32304; and Marc H. Glick, Counsel for the Board of Managers on the Part of the House of Representatives, Room 208, House Office Building, Tallahassee, Florida 32304, this 18th day of May, 1978.

Joseph C. Jacobs
Attorney

BOARD OF MANAGERS REPLY BRIEF TO RESPONDENT'S MOTION TO DISMISS

IN RE: THE IMPEACHMENT TRIAL OF SAMUEL S. SMITH, CIRCUIT JUDGE OF THE THIRD JUDICIAL CIRCUIT OF THE STATE OF FLORIDA, ON ARTICLES OF IMPEACHMENT PREFERRED AGAINST HIM BY THE FLORIDA HOUSE OF REPRESENTATIVES.

INTRODUCTORY STATEMENT

William J. Rish, H. Lee Moffitt and Ronald R. Richmond, The Board of Managers on the Part of the Florida House of Representatives: Senate Impeachment Trial of Samuel S. Smith, Circuit Judge, Third Judicial Circuit, by and through Counsel, respectfully submit this Reply Brief to Judge Smith's Motion to Dismiss.

The Board of Managers on the Part of the Florida House of Representatives will hereinafter be referred to as Managers, and Circuit Judge Samuel S. Smith will hereinafter be referred to as Respondent.

All exhibits referenced in this Brief are to be found in Volume One of the "Uniform Exhibits Before the Court of Impeachment."

STATEMENT OF THE CASE

On April 12, 1978, Respondent was impeached by the Florida House of Representatives, which unanimously voted five Articles of Impeachment as follows [Exhibit Q]:

Article I: Conviction of a felony.

Article II: Conspiracy to unlawfully obtain and distribute in excess of approximately 1500 pounds of marijuana.

Article III: Attempted bribery of officers of the State of Florida to influence performance of their official duties.

Article IV: Subverting the judicial process; and,

Article V: Conduct unbecoming a judicial officer resulting in lowering the esteem of the judiciary.

On May 18, 1978, Counsel for Respondent moved that the Senate, sitting as a Court of Impeachment, dismiss the above Articles for lack of jurisdiction as well as denial of due process.

STATEMENT OF FACTS

Respondent Samuel S. Smith, Circuit Court Judge of the Third Judicial Circuit, was duly commissioned in January, 1961.

On November 18, 1976, Respondent was arrested in his Chambers for conspiracy to possess and distribute in excess of approximately 1500 pounds of marijuana. Immediately thereafter he voluntarily suspended himself from office by requesting, and being granted, a leave of absence pending disposition of the charges.

On January 14 and February 25, 1977, Respondent was indicted by the Grand Jury of the United States District Court, Middle District of Florida, Jacksonville Division, for conspiracy to distribute and for possession of in excess of approximately 1500 pounds of marijuana, a controlled substance, in contravention of the laws of the United States [Exhibit A(1) and A(2)].

On February 16, 1977, Respondent applied to the Division of Retirement of the State of Florida for disability retirement.

Respondent was tried on the indictments above and convicted by a court of competent jurisdiction upon a jury verdict of guilty on April 29, 1977 [Exhibit B].

On June 3, 1977, the United States District Court for the Middle District of Florida pronounced its judgment of conviction against Respondent and sentenced him to 3 years incarceration [Exhibit C].

Respondent, as a matter of right under the Federal System, appealed the conviction to the United States Court of Appeals for the Fifth Circuit on June 13, 1977. That appeal, Case No. 77-5387, is still pending.

On June 20, 1977, the Judicial Qualifications Commission voted to request that the Supreme Court formally suspend Respondent Smith. Pursuant to that action, on June 23, 1977, the Judicial Qualifications Commission filed a Request for Suspension of Circuit Judge Samuel S. Smith [Exhibit D(1)], Notice of Formal Proceedings Against Judge Samuel S. Smith [Exhibit D(2)], and Certificate of Probable Cause Against Judge Samuel S. Smith [Exhibit D(3)].

The Supreme Court issued an Order to Show Cause why Respondent should not be suspended from office without pay on June 23, 1977 [Exhibit E]. Respondent replied on June 27, 1977 [Exhibit F].

On June 30, 1977, the Supreme Court ordered Respondent suspended without pay [Exhibit G].

On July 12, 1977, Respondent filed his Answer to the Notice of Formal Proceedings [Exhibit H(1)].

Respondent was notified on December 1, 1977 of a formal hearing January 18, 1978, before the Judicial Qualifications Commission [Exhibit H(2)].

On January 13, 1978, Respondent wrote a letter to Governor Reubin Askew purporting to unqualifiedly resign his office [Exhibit I]. On January 17, 1978, Governor Askew refused to accept Respondent's resignation [Exhibit J].

The Judicial Qualifications Commission has never filed an order terminating its proceedings with respect to the Respondent.

The Speaker of the Florida House of Representatives empaneled a select committee on impeachment to inquire into the conduct of Respondent Smith on January 31, 1978 [Exhibit K], and appointed the full committee on February 1, 1978 [Exhibit L].

Pursuant to the call of the Speaker, the Select Committee met February 14 and 21, March 21, 27 and 29 and April 6 and 10, 1978.

On February 21, 1978, the Select Committee took testimony and an affidavit from Respondent on the question of indigency

[Exhibit M]. As a basis for deciding whether they were required to provide Respondent with counsel, the Committee made a determination on the question of indigency.

After the determination, the Chairman of the Committee and the Speaker of the House sought an opinion from the Attorney General on March 8, 1978, as to whether counsel had to be provided the Respondent [Exhibit N]. On March 16, 1978, the Attorney General opined, in Attorney General's Opinion 078-48, that regardless of indigency the House was neither required nor authorized to provide Respondent with counsel for the pendency of their proceedings [Exhibit O].

The Select Committee, on March 21, 1978, denied Respondent's request [Exhibit P].

On April 10, 1978, upon a finding of jurisdiction and probable cause, the Committee voted to report Articles of Impeachment to the full House of Representatives.

On April 12, 1978, the full House unanimously voted five Articles of Impeachment against Respondent [Exhibit Q]. Said Articles were presented to the Senate, sitting as a Court of Impeachment, April 18, 1978.

On April 18, 1978, Respondent, through counsel, filed a Complaint for Declaratory Decree naming the President of the Senate, the Secretary of the Senate and Others as Defendants [Exhibit R]. Final Hearing on the Complaint has been set for June 2, 1978 [Exhibit S].

On April 19, 1978, Counsel for Managers and Counsel on behalf of Respondent met for a pre-trial conference with Chief Justice Overton.

On April 24, 1978, Respondent was served with a summons as per the Rules of the Senate at the Federal Courthouse in New Orleans [Exhibit T].

On April 28, 1978, Chief Justice Overton held a hearing pursuant to Respondent's Request for Continuance filed in lieu of appearance [Exhibit U]. On May 9, 1978, the Chief Justice filed his Order [Exhibit V(1)], and on May 10, 1978, summoned Counsel for Respondent and Managers to provide for scheduling. Agreement as to scheduling of arguments and briefs on jurisdiction and law was reached [Exhibit V(3)].

On May 12, 1978, pursuant to the recommendation of the Special Rules Committee, the Senate, sitting as a Court of Impeachment, accepted the Chief Justice's Order [Exhibit V (4)].

On May 18, 1978, Respondent filed a Motion to Dismiss before the Senate, sitting as a Court of Impeachment.

ARGUMENT — REPLY TO MOTION TO DISMISS

POINT I

THE SENATE SITTING AS A COURT OF IMPEACHMENT HAS ORIGINAL, EXCLUSIVE, AND FINAL JURISDICTION ON ALL QUESTIONS OF LAW AND FACT.

The Florida House of Representatives has sole power of impeachment in this state. Florida Constitution, Article III, Section 17(a) (1968). Pursuant to this authority, the House on April 12, 1978, voted unanimously to impeach Respondent for misdemeanor committed while serving as Circuit Judge of the Third Judicial Circuit [Exhibit Q]. The Florida Supreme Court has made it clear that the House of Representatives is clothed with the sole power of impeachment including the determination of what constitutes an impeachable offense. *Forbes v. Earle,* 298 So. 2d 1 (Fla. 1974), *In re Investigation of a Circuit Judge of the Eleventh Judicial Circuit of Florida,* 93 So. 2d 601 (Fla. 1957).

The Florida Senate has original, exclusive, and final jurisdiction to try this impeachment case by virtue of Article III, Section 17(c) of the Florida Constitution.

Similar provisions contained in the United States Constitution give the United States House of Representatives sole power to impeach and the Senate sole power to try the impeachment. U.S. Const., Article II, Section 4.

When sitting as a Court of Impeachment, the Florida Senate is clothed with a jurisdictional power that is unique in our law. It establishes its own rules of procedure for the conduct of the trial. Fla. Const., Article III, Section 4(a). It, in effect, serves as both judge and jury by determining questions of both law and fact.

Furthermore, it is a court of original and final jurisdiction as stated in an early advisory opinion by the Florida Supreme Court to the Governor:

> Let us compare the powers and functions of the Senate in this matter with the power of this court. What is the Senate when organized for the purpose of trying impeachments? What is the extent of its jurisdiction, and what relation exists between this tribunal and that? The Senate, when thus organized, is unquestionably a court—because it is a body invested with judicial functions; because it determines issues both of law and fact; because it announces the law in the form of judgment, and through that instrumentality adjudges the penalties named by the Constitution. Not only is it a court, but it is a court of exclusive jurisdiction and final jurisdiction. Its judgment can become the subject of reversal or review in no other court known to the Constitution and laws. *In the Matter of the Executive Communication,* 14 Fla. 289, 295 (Fla. 1872).

In the above case, Governor Reed had been impeached and the Senate conducted a trial. However, the Senate adjourned without reaching a decision which prompted the Governor to request an advisory opinion on whether the Senate had effectively dismissed the impeachment by its adjournment. The Court, in effect, declined jurisdiction by citing the unique nature of the Senate impeachment power when sitting as a Court of Impeachment:

> "While thus it is a court, it is none the less the Senate, for the Constitution declares that *"all impeachments shall be tried by the Senate."* One class of politicians have contended that it is a Senate and not a court; another class that it is exclusively a court. It is in fact both . . . This jurisdiction (The Senate sitting as a Court of Impeachment) is too high and transcendent to be invaded. *Id.* at 296.

The Court made it clear that so long as the constitutional rights of the subject of the impeachment were not violated, the Senate's jurisdiction was exclusive and final:

> Our only jurisdiction is to follow and enforce the Senate's final action and judgment, if constitutional . . . After an impeachment perfected according to the Constitution, the whole matter is with the Senate, and it has the exclusive right of determining all questions which may arise in the case. If its action is unconstitutional, we have the right and power to declare its nullity, and, in a proper case before us, to enforce the right of any party of which it proposed to deprive him. *Id* at 300.

This point is also made in Chief Justice Terrell's now famous brief before the Senate sitting as a Court of Impeachment in the case of Judge Holt.

There is no indication that these early statements on the nature of the unique jurisdiction of the Senate, sitting as a Court of Impeachment, on all questions of law and fact are any less true today. In the last full Senate Impeachment Trial prior to the one at bar, Justice E. Harris Drew, who was presiding over the 1963 Senate Trial of Circuit Judge Richard Kelly wrote in the Foreword of a bound booklet printed for each Senator's use:

> I cannot emphasize too strongly that you, as Senators, are vested under our Constitution and the precedents of the Courts with almost absolute power in these proceedings— You constitute a court of exclusive, original and final jurisdiction. You are both Judge and Jury. *Senators Deskbook, In re: Impeachment of Circuit Judge Richard Kelley*, p. 1 (1963).

Respondent's Motion to Dismiss raises several questions of law. On these questions, as well as each and every question of law and fact which arises in this impeachment trial, the Senate, sitting as a Court of Impeachment, has sole and exclusive jurisdiction. The ultimate decision on each of these issues belongs to the Senate, sitting as a Court of Impeachment, and rests in its sole and sound discretion.

POINT II

RESPONDENT'S ASSERTIONS THAT HE HAS RESIGNED, HAS BEEN CONVICTED OF A FELONY, AND HAS RETIRED, HAVE NO RELEVANCE TO THE QUESTION WHETHER THE FLORIDA SENATE, SITTING AS A COURT OF IMPEACHMENT, HAS JURISDICTION TO PROCEED AGAINST RESPONDENT.

Respondent contends that he has resigned, been convicted of a felony, and retired. Based upon these assertions, he further contends that he is not subject to proceedings in the Senate, sitting as a Court of Impeachment. Ample Federal and Florida precedents reveal that such assertions have no merit. Regardless of Respondent's status in these regards, the Senate, sitting as a Court of Impeachment, may proceed first to determine whether it has jurisdiction and, second, to try the merits of the case.

While there is no Florida impeachment law addressing this point directly, cases in the Congress of the United States lead to the inescapable conclusion that the Florida Senate, sitting as a Court of Impeachment, has jurisdiction over Respondent.

The earliest Federal impeachment proceedings were conducted against Senator William Blount in 1798. He was charged with conspiring to aid the British in an attempt to gain control of Louisiana and Spanish Florida.

Blount had been removed by the Senate under its powers to discipline its own members. The House, however, proceeded to impeach him and the Senate convened as a court to try the articles of impeachment.

Blount pleaded that (1) a senator was not subject to impeachment, and (2) he was no longer a senator by virtue of his previous removal. This plea was accepted by the Senate, though it is not clear which point carried the day.

Significant, however, was the discussion regarding whether Blount could escape impeachment by resigning. Representative Bayard stated in debate that he could "apprehend no subsequent event, grounded on the willful act, or caused by the delinquency of the party, can vitiate or obstruct the proceeding. Otherwise, the party, by resignation or the commission of some offense which merited and occasioned his expulsion, might secure his impunity. This is against one of the sagest maxims of the law, which does not allow a man to derive a benefit from his own wrong." 2 *Annals of Congress* 2261 (1798).

Even more significant was the concession by Blount's own counsel that a person could not avoid impeachment by resignation:

> "It is among the less objections of the cause that the defendant is now out of office, not by resignation. *I certainly shall never contend that an officer may first commit an offense and afterwards avoid punishment by resigning his office.*" 2 *Annals of Congress* 2293 (1798). (Emphasis supplied)

This position is not done violence by the Senate's action in Blount. Even though the Senate did not go on to try the case on its merits, there can be no question that it did assert jurisdiction to determine its course of action. On that basis, the Court of Impeachment in the present case may proceed.

The proposition that a person cannot avoid impeachment by resigning his office was solidly reaffirmed in 1876, when former Secretary of War William W. Belknap was impeached by the U. S. House and tried in the Senate.

Belknap resigned and had his resignation accepted (which is not the case here) in the face of the House's impeachment proceedings. After the House impeached Belknap, the Senate took jurisdiction and tried the case on its merits notwithstanding Belknap's accepted resignation. Although Belknap was acquitted because the vote fell five short of the two-thirds majority needed to convict, the case stands uncontraverted for the proposition that a court of impeachment has jurisdiction over offending officers who have resigned in the face of discipline.

The reasoning of the Senate in the Belknap case was indicated by the remarks of House Manager, Representative Lord:

> An officer in one sense never loses his office. He gets his title and he wears it forever, and an officer is under this liability for life; if he once takes office under the United States, if while in office and as an officer he commits acts which demand impeachment, he may be impeached even down to the time to which the learned counsel, Mr. Carpenter, so eloquently referred the other day — down to the time he takes his departure from his life. 44 *Congressional Record* Record of Trial, p. 34.

To this, House Managers, Representatives George Jenks and George Hoar, added:

> The history of the steps by which these constitutional provisions found their place . . . bring us irresistibly to the conclusion that the power of the Senate of the United States over all grades of public official national wrongdoers, a power conferred for the highest reasons of state and on fullest deliberation, to interpose by its judgment a perpetual barrier against the return to power of great political offenders, does not depend upon the consent of the culprit, does not depend upon the accidental circumstance that the evidence of the crime is not discovered until after the official term has expired or toward the close of that term, *but is a perpetual power, hanging over the guilty officer during his whole subsequent life, restricted in its exercise only by the discretion of the Senate itself and the necessity of the concurrence of both branches, the requirement of a two-thirds' vote for conviction, and the convictional limitation of punishment. Id.*, Record of Trial, p. 57.

Representative Hoar succinctly stated the nature of the issue in an observation that applies equally well to the question now before this Court of Impeachment:

> We say that the Constitution in substance is this: "The Senate shall have the sole power to try impeachments, and civil officers shall be removed on conviction." The counsel for the defendant would state it to be: "Judgment in case of conviction shall be removal from office and disqualification if the defendant is willing." *Id.*, Record of Trial, p. 60.

The effect of an officer's resignation on his impeachment was again addressed in the case of U. S. District Judge George W. English. In 1926, English was impeached by the U. S. House of Representatives on charges of partiality, tyranny, and oppression in office. English submitted his resignation to President Calvin Coolidge, who accepted it.

The Senate subsequently agreed to a resolution offered by the House that the proceedings be terminated. 69 *Congressional Record* 44 (1926). It was maintained, however, that:

> ". . . the resignation of Judge English in no way affects the right of the Senate, sitting as a Court of Impeachment, to hear and determine said impeachment charges." 69 *Congressional Record* 297 (1926).

Clearly, the fact that English's resignation had been submitted and accepted, thus removing him from office, did not *force* the Senate to stop the impeachment trial. Rather, the proceedings were terminated as a matter of the Senate's *discretion.* It is just as clear that the United States Congress has never relinquished its ability to continue an impeachment trial in the face of resignation if such course was chosen.

As the examples above indicate, the Federal precedents overwhelmingly support the proposition that, though a person no longer holds an office, he is nonetheless subject to impeachment and trial. In addition, a similar precedent was provided in this state just last year, when the Florida Supreme Court removed Circuit Judge Stewart LaMotte. LaMotte attempted to resign before the Supreme Court decision removing him was final. The Governor refused to accept his resignation. The Supreme Court, notwithstanding the resignation, issued a final order removing LaMotte from office.

The fact that LaMotte had attempted to resign from the bench did not operate to disturb the Supreme Court's jurisdiction to subsequently remove him. Neither, the Managers submit, should such a consideration interfere with the Senate's power to try Respondent.

Respondent argues that no one has been convicted of impeachment after resignation and, further, that recent impeachments have been discontinued upon resignation of the officer involved. But those arguments do not speak to a court of impeachment's jurisdiction and ability to proceed. Respondent's argument would lead to the illogical conclusion that because no person has been convicted of impeachment in Florida, the Senate is powerless to try them.

In fact, in all of the examples cited by Respondent, the resignations were accepted by the Governor and the proceedings were terminated as a matter of discretion. Indeed, in the case of former Insurance Commissioner Tom O'Malley, the House Managers agreed to terminate the impeachment proceedings only "upon the filing, *acceptance by the Governor,* and the recording of the resignation . . ." *Journal of The Florida Senate, Sitting as Court of Impeachment, Addendum,* July 29, 1975. (Emphasis supplied)

The same situation occurred with respect to the terminations of impeachment proceedings against Justice McCain (*Record, Select Committee on Impeachment: Inquiry Into Justice McCain,* Vol. 6, Book V, p. 142-146 [1975]), and Justice Dekle (*Record, Select Committee on Impeachment: Inquiry Into Justice Dekle,* Vol. 3. Book G, p. 3 [1975]).

In addition to the cases cited above, strong support for this position is provided in the public policy aimed at ensuring the honesty and moral character of Florida's state officers. As pointed out in the Belknap case, the remedies available to the Senate—removal from office, and disqualification from future office—are divisible; the fact that the former remedy is eliminated by resignation, retirement or conviction of a crime, should not eliminate the latter remedy. To hold otherwise would have at least three unwanted effects: First, it would hinder the Senate in its role as guardian of the public trust. Second, it would frustrate the vindication of the public for wrongs committed at its expense. Third, it would allow an unscrupulous person to profit from his own wrongdoing and then avoid punishment simply by mailing a resignation to the Governor.

The Managers respectfully submit that Respondent's assertions that he has resigned, been convicted of a felony, and retired, have no effect whatsoever upon the power of this Court of Impeachment to try Respondent under the Articles of Impeachment approved and forwarded by the House of Representatives.

POINT III

RESPONDENT HAS NOT REMOVED HIMSELF FROM OFFICE BY RESIGNATION OR RETIREMENT, NOR HAS HE BEEN REMOVED BY CONVICTION OF A FELONY.

A(1). RESIGNATION

Respondent was indicted by a federal grand jury on January 14 and February 25, 1977, for conspiracy to possess and distribute marijuana, and for knowingly and intentionally unlawfully possessing with intent to distribute, a quantity of marijuana [Exhibit A(1) and A(2)]. He was convicted by a jury on April 29, 1977 [Exhibit B], and was adjudged guilty and sentenced on June 3, 1977 [Exhibit C]. He was suspended from office by the Florida Supreme Court on June 30, 1977 [Exhibit G].

On February 15, 1977, Respondent filed an application for disability retirement with the State Division of Retirement. And on January 13, 1978, Respondent sent a letter of resignation to Governor Askew [Exhibit I]. The Governor refused to accept the resignation [Exhibit J].

These dates imply an apparent purpose for the attempted resignation and retirement. Conviction of certain offenses or conviction by the Senate of an impeachable offense results in a forfeiture of retirement benefits. Section 121.091(5), (f), (g), Florida Statutes.

In spite of the reasons Respondent asserted in his purported letter of resignation, the Managers submit that the true reasons are obvious; if convicted by the Senate of an impeachable offense he will forfeit substantial retirement benefits. The effect of Respondent's attempted resignation is, therefore, extremely important.

Florida follows the rule adopted at common law and in the majority of states that a resignation is not effective until accepted. The rule in Florida was clearly analyzed and established in *State ex rel. Gibbs v. Lunsford,* 141 Fla. 12, 192 So. 485 (1939), which involved the suspension and attempted resignation of Constable Wallace Caswell.

In its consideration of whether a resignation must be accepted in order to be effective where the statute was silent on the subject, the Florida Supreme Court made the following observation:

> "The right to resign will be denied *especially where the resignation is hastily made for the purpose of thwarting litigation.*" 192 So. at 487-488 (Emphasis supplied)

The situation in the case currently before the Senate is clearly analogous. The Managers submit that the timing of Respondent's purported resignation clearly discloses an intent to avoid the impending Senate trial pursuant to Article III, Section 17, Florida Constitution.

The Court in *Lunsford* concluded that "[t]he resignation became effective (regardless of the contrary statement in the resignation) when it was accepted by the Governor." 192 So. at 489. The Court noted that some jurisdictions hold the contrary view, but it followed what it termed the "weight of authority in this country."

There are a number of striking similarities between *Lunsford* and the present case. Both involve officers suspended from office and who were not actually performing the official duties of their respective offices. Both attempted to make their resignations effective on the date they wrote them. Therefore, in both instances, there was a unilateral attempt to immediately resign. Both cases also involve evasive resignation; resignations that would avoid ongoing or impending collateral action. When Caswell attempted to resign, he was under suspension, and awaiting action by the Senate. Respondent tried to resign in the face of a federal indictment and imminent legislative action.

The statute in effect when Caswell purported to resign, Section 461, C.G.L., was the same as present Article X, Section 3, Florida Constitution (1968), in that it simply stated that an office was deemed vacant upon "resignation." Yet the Florida Supreme Court in *Lunsford* followed the well-established common law and required acceptance before the resignation was complete.

Twenty months prior to its decision in *Lunsford*, the Florida Supreme Court seemed to have reached a contrary conclusion in *State ex rel. Landis v. Heaton*, 132 Fla. 443, 180 So. 766 (1938). Though the Court did not analyze the question as deeply as it would in *Lunsford*, it held that a resignation, effective immediately and coupled with an abandonment of office, did not require acceptance. It is worthy of note that the Court quoted from an Alabama case holding that acceptance was not necessary to effectuate a resignation, and later in *Lunsford*, specifically noted that Alabama was one of those jurisdictions that followed the minority rule.

Heaton does not involve an evasive resignation. The issue there was whether a composition of the Florida Industrial Commission violated the statutory prohibition against having more than one member classified as a representative of "employees." Britton was one of two members alleged to have represented "employees." He "resigned" to take a full-time teaching job and so informed the Governor. After the "resignation" he severed all official connections with the Commission, and was deemed to have abandoned his office.

Respondent has not similarly abandoned his office. In fact, he is attempting to reap all of the privileges and benefits of the job by retirement and receiving a pension. A true abandonment would involve a waiver of both privileges and duties. (Note that in *Lunsford*, the Court did not hold that Caswell had abandoned his office, although he could not carry out official duties because of his suspension.)

In any event, *Lunsford* is later in date than *Heaton*, and the issues are more squarely addressed and more deeply analyzed. It either overrules or drastically modifies *Heaton*.

Respondent has asserted that these and other cases requiring an acceptance by the Governor before a resignation is effective have been overruled by *Spector v. Glisson*, 305 So. 2d 777 (Fla. 1975). The only apparent basis for such a contention is the following statement in the Court's opinion:

> . . . the earlier question in the present controversy as to the Governor's "acceptance" of such resignation was *rendered moot* by the fact, now conceded, that the Governor subsequently decided to and did accept the resignation, which may not have been controlling in any event." 305 So. 2d at 780 (Emphasis supplied)

Dicta to the effect that the answer to a mooted question "may not have been controlling in any event" is hardly a basis for declaring that clear precedents to the contrary have been overruled.

The statement is clearly gratuitous in light of the fact that the Governor in *Spector* had accepted the resignation in question. Even more important is that *Spector* involved a prospective resignation, one sought to be effective in the future. Such facts raise more complex issues. *Spector* merely held that if a resignation *in futuro* is accepted, it creates a future vacancy which may *then* be filled by the appropriate method.

In 1938, when *Lunsford* was rendered, Section 461, C.G.L. (1927), provided that vacancy in office would occur upon "resignation." The word was not further defined. As previously stated, *Lunsford* construed the word "resignation" under the common law to mean an *accepted* resignation. When the 1968 Constitution was adopted, Article X, Section 3, adopted the same provision, that "resignation" would create a vacancy. The common law may be used to construe provisions of the Florida Constitution. *English v. State*, 31 Fla. 340, 12 So. 689 (1893). In this case, it is clear that the word "resignation" in Article X, Section 3, retains its common law meaning. Just as clearly, a "resignation" at common law is ineffective and non-existent until it has been accepted.

Respondent cites, for a history of the contrary view, the case of *State of Nebraska v. Hill and Benton*, 37 Neb. Rep. 80, dated in 1893. He fails to point out, however, that Nebraska's position that a resignation does not have to be accepted is clearly a minority view. In addition, the Nebraska procedure is distinguishable from the case here, in that impeachments in that state are tried by the Supreme Court.

The so-called "black-letter" law on this point is set forth in 95 A.L.R. 215, "When resignation of public officer becomes effective":

> . . . a resignation of a public officer cannot take effect until it is accepted, at least in the absence of constitutional or statutory provision to the contrary, and this may be fairly regarded as the rule supported by the greater weight of authority.

The annotation and later case service list at least twenty-four jurisdictions which are in accord with Florida on this general rule. None of these cases involved an apparent intent to evade a judicial or legislative process by resignation. However, the fact that the attempted resignation of Respondent is for such purpose makes the requirement of acceptance even more compelling.

It is worthy of note that at least one Supreme Court has squarely held that a public official may not resign at all, re-

gardless of the acceptance issue, in the face of impeachment proceedings. In *Ferguson v. Maddox*, 263 S.W. 888, 114 Tex. 85 (1924), the former Governor sought to run for office. Some six years prior the former Governor had been impeached, and, as a portion of the impeachment penalty, disqualified thereafter to hold any office in the state. The validity of the former impeachment was at issue by virtue of the fact that the Governor had resigned before the Texas Senate convicted him of the impeachment charges. Pointing out that removal from office was only one of the possible penalties of an impeachment conviction, the Texas Supreme Court stated:

> . . . *If the Senate only had the power to remove from office, it might be said, with some show of reason, that it should not have proceeded further when the Governor, by anticipation performed, as it were, its impending judgment.* But under the Constitution the Senate may not only remove the offending official; *it may disqualify him from holding further office,* and with relation to this latter matter his resignation is wholly immaterial. For their protection the people should have the right to remove from public office an unfaithful official. It is equally necessary for their protection that the offender should be denied an opportunity to sin against them a second time. *The purpose of the constitutional provision may not be thwarted by an eleventh-hour resignation.* 263 S.W. at 893 (Emphasis supplied)

The *Maddox* case is important for the proposition that an impeachment ". . . may not be thwarted by an eleventh-hour resignation," especially since impeachment in this case may determine further qualification to hold office, Article III, Section 17(c), Florida Constitution; or entitlement to retirement as a judicial officer, Section 121.091(5)(g), Florida Statutes, as well as removal from office.

A(2). ACCEPTANCE OF RESIGNATION BY GOVERNOR IS NOT AN UNLAWFUL DELEGATION OF LEGISLATIVE AUTHORITY

In addition, Section 114.01(1), (d), as amended effective June 16, 1977, reads as follows:

"(1) A vacancy in office shall occur:

(d) Upon the resignation of the officer *and acceptance thereof by the Governor.*" (1977 amendment underlined)

Respondent asserts that, if the statute is construed to require acceptance by the Governor as a condition precedent to its being effective, it is an unlawful delegation of power and in direct conflict with *Spector.*

The basis for this contention is that the Governor does not have the authority to accept or reject a resignation, and that the Legislature has therefore attempted to delegate such authority unlawfully. The premise for all this is that *Spector* holds an acceptance by the Governor is not necessary. Of course, as previously pointed out, *Spector* holds no such thing. Indeed, the Court in *Spector* explicitly noted the fact that the question of acceptance was moot and was, therefore, not before the Court.

In fact, the addition of the words "and acceptance thereof by the Governor" constitute nothing more than the Legislature's construction of the word "resignation" in Article X, Section 3, Florida Constitution, in light of the common law discussed above and the *Lunsford* decision. A legislative construction of the Constitution is entitled to great weight. *Greater Loretta Improvement Assoc. v. State ex rel. Boone,* 234 So. 2d 665, 669-670 (Fla. 1970); *Amos v. Moseley,* 74 Fla. 555, 77 So. 619, 625 (1917):

> . . . where a constitutional provision may well have either of several meanings, it is a fundamental rule of constitutional construction that, if the legislature had by statute adopted one, its action in this respect is well-nigh, if not completely controlling. *Greater Loretta Improvement Assoc.,* 234 So. 2d at 669.

Thus, under the law as it exists in Florida and the majority of jurisdictions in the United States, Respondent's purported "resignation" is not effective since it has not been accepted by the Governor.

B. CONVICTION

Neither is there merit in Respondent's contention that the judgment of guilt in his Federal trial immunizes him from proceedings in the Senate. In fact, as that term is used for these purposes, Respondent has not been "convicted" until his appeal has been dealt with.

Section 114.01(1), (j), Florida Statutes, provides that a vacancy in office shall occur "[u]pon conviction of the officer of a felony as defined in s. 10, Art. X of the State Constitution." Article X, Section 10, of the Florida Constitution provides:

> The term "felony" as used herein and in the laws of this state shall mean any criminal offense that is punishable under the laws of this state, or that would be punishable if committed in this state, by death or by punishment in the state penitentiary.

There is no question but that a jury verdict of guilty was returned against Respondent, and that the trial court has adjudged him guilty and pronounced sentence. Respondent has taken direct appeal from the jury verdict.

Thus, the issue is whether one is "convicted" for purposes of Section 114.01(1), (j), Florida Statutes, when a guilty verdict is returned, or upon termination of any direct appeal. The Florida courts have long held the latter point of view.

The only Florida decision directly on point is *In re Advisory Opinion to the Governor,* 75 Fla. 674, 78 So. 673 (1918). There, the Court was construing a Florida law that provided that an office was deemed vacant where the incumbent is convicted of any infamous crime or felony. (Note the similarity with Section 114.01(1), (j), Florida Statutes.) In that case, as in the instant case, it was necessary to determine whether a public office became vacant even though the public official's conviction had been appealed. The Court stated:

> While an officer may be suspended from office "for the commission of any felony," the office is not "deemed vacant" under section 298 of the General Statutes, except upon "conviction," *and a conviction is not operative while a supersedeas is effective.*" 78 So. at 674 (Emphasis supplied)

That quote was cited with approval in *In re Advisory Opinion to the Governor,* etc., 313 So. 2d 697 (Fla. 1975), a case involving the suspension of indicted county officials.

Other cases holding that the use of the word "conviction" in statutes refers to convictions after appeal, include: *State ex rel. Volusia Jai-Alai, Inc. v. Board of Business Regulation,* 304 So. 2d 473 (Fla. 1 DCA 1974); *Joyner v. State,* 158 Fla. 806, 30 So. 2d 304 (1947); *Ledee v. State,* 342 So. 2d 100 (Fla. 3 DCA 1977).

Therefore, since Respondent is now vigorously pursuing an appeal of the trial court's adjudication of guilt in his criminal case, he has not been "convicted" as that word has been construed by the Supreme Court in *In re Advisory Opinion to the*

Governor, 75 Fla. 674, 78 So. 673 (1918), and the other decisions of Florida courts. He cannot, therefore, claim to be immune from trial in this Court of Impeachment for that reason.

C. RETIREMENT

Neither has Respondent escaped the proceedings of this Court of Impeachment by virtue of his purported "retirement." Indeed, at this date, it has not been determined by any authority whether Respondent has, in fact, retired.

After receiving Respondent's application for disablity retirement, the Division of Retirement sought declaratory relief in the Circuit Court, alleging that they were in doubt as to their duties as to whether they could entertain Respondent's application.

The Circuit Court granted summary judgment for Respondent and the decision was affirmed by the Supreme Court. *Williams v. Smith*, Florida Supreme Court, Case No. 52840, decided April 4, 1978. [Exhibit R(1)]

The purpose for which Respondent cites this decision in his brief is unclear, for nowhere in its opinion does the Court suggest that Respondent has, indeed, retired. The effect of the decision is only to require the Division of Retirement to entertain Respondent's application for disability retirement benefits.

Under Section 122.13, Florida Statutes, the Division of Retirement is charged with the "effective administration" of the Florida Retirement System. Pursuant to this mandate, it is incumbent upon the Division to examine each application and determine, subject to the Administrative Procedure Act, whether the applicant is, in fact, eligible for retirement under Chapter 122, Florida Statutes, relating to the requirements of the Florida Retirement System. See *Bolinger v. Division of Retirement*, 335 So. 2d 568 (Fla. 1 DCA 1976)

In Dubin v. Department of Business Regulation, 252 So. 2d 290 (Fla. 1 DCA 1971), the First District Court of Appeal held, in the context of the 1961 Administrative Procedure Act, that an agency's adjudicatory decision

> . . . is not deemed complete, and thus "rendered," until three days following the date upon which the agency served its order on the party respondent by mail. 252 So. 2d at 292

This holding was applied to the current Administrative Procedure Act in *Murphy v. Division of Retirement*, 342 So. 2d 147 (Fla. 1 DCA 1977).

As of this date, the Division has not made any such determination. It has not issued its Order granting or denying disability retirement status and, therefore, has not engaged in "final agency action" reviewable under Section 120.68, Florida Statutes (Administrative Procedure Act).

Under Section 120.52(8), Florida Statutes, " 'Order' means a final agency decision which does not have the effect of a rule and which is not excepted from the definition of a rule, whether affirmative, negative, injunctive, or declaratory in form. An agency decision shall be final when reduced to writing." Section 120.52(2), Florida Statutes, defines "Agency Action" as "the whole or part of a rule or order, or the equivalent, or the denial of a petition to adopt a rule or issue an order . . ."

As indicated above, only three events have occurred regarding Respondent's retirement status: (1) his application; (2) the Division's request for declaratory relief; (3) the Supreme Court's order that the Division entertain Respondent's application. The Division has yet to make a determination, pursuant to its exclusive authority to do so, whether Respondent is, in fact, eligible for retirement under the Florida Retirement System. Until such a determination is made and released by the Division, it cannot be maintained that Respondent has retired.

For this reason, the Managers submit that Respondent has not, in fact, retired from his office and, consequently, he cannot claim to be immune from these proceedings on that basis.

In summary, the preceding discussion clearly reveals that Respondent has failed to prove his claim that he is not an officer subject to impeachment by the House and trial by the Senate. Respondent is a circuit court judge who has been suspended pending the disposition of the criminal charges against him and the proceedings of this Court of Impeachment. He has submitted a letter of resignation which, it has been shown, was ineffectual absent the Governor's acceptance. He has submitted an application for disability retirement, which has yet to be accepted or rejected by the State Division of Retirement. He has been adjudged guilty of a felony, which conviction is not final pending his appeal.

The overwhelming weight of authority holds that these circumstances did not operate to remove Respondent from office so as to immunize him from these proceedings.

POINT IV

RESPONDENT HAS FAILED TO SHOW A DEPRIVATION OF HIS CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW.

Respondent alleges in his Motion to Dismiss that the impeachment proceedings of the Florida Legislature violate his right to due process of law, as guaranteed by the Fourteenth Amendment to the United States Constitution, and Article I, Section 9, of the Florida Constitution (1968).

It does not appear that Respondent's Motion and Brief make any issue of the proceedings before the Select Committee on Impeachment and the Florida House. The Board of Managers proffers that the House proceedings are analogous to those of the Grand Jury and that they accorded Respondent all applicable rights under the precedents and law in the area.

Respondent contends that the Senate's refusal to furnish him with counsel is in derogation of his constitutional right to due process of law. The question of whether an officer is entitled to the appointment of counsel in the Senate's impeachment trial is one within the sole discretion of that legislative body.

There is no constitutional right to appointed counsel absent the threat of deprivation of one's liberty. Clearly, an impeachment conviction does not constitute any threat of impeachment. To the contrary, Article III, Section 17(c), Florida Constitution provides: "Conviction or acquittal shall not affect the civil or criminal responsibility of the officer." Therefore, Respondent is not entitled to rely upon the line of cases that have held that an indigent defendant has a constitutional right to court-appointed counsel in *criminal* proceedings. *Powell v. State of Alabama*, 287 U.S. 45, 77 L. Ed. 158, 53 S. Ct. 55 (1932); *Johnson v. Zerbst*, 304 U.S. 458, 82 L. Ed. 1461, 58 S. Ct. 1019 (1938); *Gideon v. Wainwright*, 372 U.S. 335, 9 L. Ed. 2d 799, 83 S. Ct. 792 (1963); *In Re Gault*, 387 U.S. 1, 18 L. Ed. 2d 527, 87 S. Ct. 1428 (1966); and *Argersinger v. Hamlin*, 407 U.S. 103, 32 L. Ed. 2d 530, 92 S. Ct. 2006 (1972). In each of these cases the defendant was faced with the possibility of being imprisoned if found guilty. A judgment of conviction in Respondent's case could not possibly result in a deprivation of his liberty. The

consequences of an impeachment conviction are spelled out in the Florida Constitution. "Judgment of conviction in cases of impeachment shall remove the offender from office and, in the discretion of the senate, may include disqualification to hold any office of honor, trust or profit." Article III, Section 17(c), Florida Constitution.

Previous attempts to extend the right to appointed counsel to civil proceedings which involve no threat of imprisonment have failed. *Ferguson v. Gathright,* 485 F.2d 504 (4th Cir. 1973) (no right to appointed counsel for driver's license revocation proceedings); *Nees v. Securities and Exchange Commission,* 414 F.2d 211 (9th Cir. 1969) (no right to appointed counsel for securities salesman's license revocation proceedings); *Boruski v. Securities and Exchange Commission,* 340 F.2d 991 (2d Cir. 1965) (no right to appointed counsel in proceedings revoking registration of broker); *Woodham v. Williams,* 207 So.2d 320 (Fla. 1 DCA 1968) (no right to appointed counsel in proceeding revoking insurance agent's license); and *State v. Love,* 312 So.2d 675 (La. 2d Cir. 1975) (no right to appointed counsel in proceedings revoking defendant's driver license.)

In light of the authorities cited above, Managers submit that Respondent has failed to show why the Florida Senate should expand the present constitutional doctrine on appointed counsel and provide him with counsel at government expense for his Senate impeachment trial.

Furthermore, Respnodent has failed to show that he has in fact been prejudiced in any way either by his absence or by the Senate's refusal to furnish him with counsel. As to questions in fact, the only testimony in the impeachment record is that which was undertaken by the House during its proceedings and is limited to testimony which was extracted from the record in Respondent's prior criminal trial. No witnesses have been called in the Senate at this point. Respondent has not been deprived, therefore, of any right to confront adverse witnesses.

As to questions of law that have arisen within the course of the impeachment proceedings, Respondent has been well represented by his counsel in both the Leon County Circuit Court [Exhibit R(1)], and the Florida Senate [Exhibit V(1)]. The legal issues raised by Respondent's pending Motion to Dismiss in the Senate are the same legal issues that were raised by Respondent in his Complaint for Declaratory Decree filed in the Leon County Circuit Court. Therefore, counsel for Respondent and Respondent himself should be well acquainted with these issues. In addition to Respondent's able representation by counsel, Respondent himself is an attorney and a judge, and therefore very capable of understanding the charges against him in this impeachment proceeding.

It should be noted that every hearing in the Senate Impeachment Trial to date has been scheduled at a time when Respondent's current criminal trial was in recess. It is also important to note that counsel for Respondent has agreed to enter Respondent's plea and to proceed with the arguments of law in the absence of Respondent. No final decision has been made as to the time for hearing Respondent's arguments on the merits.

Respondent also states in his Motion to Dismiss that his health is such as to make it impossible for him to participate in the Senate impeachment proceedings at this time and in the foreseeable future. He further contends that for the Senate to proceed with the Impeachment Trial under the circumstances violates his constitutional right to due process of law.

There is very little precedent within the realm of impeachment on this issue. The Florida Supreme Court has held that, where a defendant's poor health is cited as grounds for continuing or delaying a criminal trial:

"Motions for a continuance are in the discretion of the trial court, and the action of that court on them will not be reversed unless there has been a palpable abuse of that discretion to the disadvantage of the accused, or whereby his rights may have been jeopardized." *Hysler v. State,* 181 So. 356 (Fla. 1938). *Reaff'd* in *Gurr v. State,* 7 So.2d 590, (Fla. 1942).

If this be the due process standard in criminal proceedings, Managers respectfully submit it is clear that the Senate has sole discretion to determine the issue of Respondent's health and alleged inability to participate in an impeachment trial which is largely civil in nature. It is also worthy of note that Respondent's health condition has not caused his federal criminal trial now in progress to be continued.

In conclusion, it is submitted that Respondent has failed to show a deprivation of his constitutional right to due process of law either by lack of appointment of counsel or inability to be present thus far or inability to participate in the foreseeable future because of poor health.

It is further submitted that Respondent has been afforded each and every one of these rights during the Senate impeachment proceedings to date and that, in any event, the ultimate decision on each of the issues raised by Respondent lies solely with the Florida Senate.

CONCLUSION

In light of the above statutes and authorities the Managers urge that Respondent's Motion to Dismiss be denied.

Respectfully submitted,
MARC H. GLICK
Counsel for Managers
on the Part of the Florida House

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original hereof was filed with the Secretary of the Florida Senate and copies furnished by hand delivery to the Honorable Ben F. Overton, Chief Justice, Florida Supreme Court, Tallahassee, Florida 32304; and Joseph C. Jacobs, Counsel for Respondent Samuel S. Smith, appearing specially, 305 South Gadsden Street, Tallahassee, Florida, 32301, this 24th day of May, 1978.

Marc H. Glick

(A list of uniform exhibits appears on page.)

DEMAND FOR DISCOVERY

COMES NOW the Respondent, SAMUEL S. SMITH, by and through his undersigned attorney, and pursuant to Rule 29 of the Rules of Practice and Procedure when sitting on the trial of impeachments as adopted by The Florida Senate, and Rule 3.220 of the Florida Rules of Criminal Procedure, and hereby files this, his written Demand for Discovery, and requests the Board of Managers of the House of Representatives, within fifteen (15) days after receipt hereof, to disclose to defense counsel and to permit defense counsel to inspect, copy, test and photograph the following information and material within the possession or control of the Board of Managers of the House of Representatives:

1. The names and addresses of all persons known to the Board of Managers to have information which may be relevant to the Articles Of Impeachment and to any defense with respect thereto, and also the names and addresses of all persons known to the Board of Managers to have information which may be relevant to the Articles Of Impeachment.

2. The statement of any persons whose name is furnished in compliance with the preceding paragraph, including any written statement made by said person and signed or otherwise adopted or approved by him, or a stenographic, mechanical, electrical or other recording, or a transcript thereof, or which is a substantially verbatus recital of an oral statement made by said person to an officer or agent of the State of Florida, the United States Government or of the Board of Managers, and recorded contemporaneously with the making of such oral statement.

3. Any written or recorded statements and the substance of any oral statements made by the Respondent, Samuel S. Smith, together with the names and addresses of each witness to said statements.

4. Any tangible papers or objects which were obtained from or allegedly belong to the Respondent, and which were obtained by agents in connection with indictments previously returned against the Respondent by the United States Government.

5. Any tangible papers or objects which the Board of Managers intends to use at the trial of this cause which were not obtained from or belong to the Respondent.

6. The criminal record or information from the Federal Bureau of Investigation rap sheets concerning any witness the Board of Managers intends to call in this matter.

7. Whether the Board of Managers has any material or information which has been provided by confidential informants.

8. Whether there has been any electronic surveillance, including wire tapping, of the premises of the Respondent or of conversations to which the Respondent was a party, and any documents relating thereto; in the event there has been any electronic surveillance, the Respondent requests that the State furnish the Respondent with the recording of said conversations or a transcript of said recording or recordings.

9. Whether there has been any search and seizure and any documents relating thereto.

10. Reports or statements of experts made in connection with this particular cause, including but not limited to scientific tests or experiments conducted with regard to electronic surveillance or wire tapping, and scientific tests or experiments conducted by anyone at either State or Federal laboratories in connection with the chemical analysis of a substance known as Cannabis Sativa, commonly known as marijuana.

11. Any material or information in the Board of Managers' possession or control which tends to negate the guilt of the Respondent as with regard to the Articles Of Impeachment.

DATED this 2nd day of August, 1978.

Ronald K. Cacciatore
Attorney for Respondent Samuel S. Smith

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Demand for Discovery has been furnished to the HONORABLE MARC H. GLICK, ESQUIRE, Attorney for Board of Managers of the House of Representatives, 208 House Office Building, Tallahassee, Florida, 32304, by first class mail this 2nd day of August, 1978.

Ronald K. Cacciatore
Attorney

RESPONSE TO DEMAND FOR DISCOVERY

COMES NOW the Managers on the Part of the Florida House of Representatives, by and through their undersigned attorney, and pursuant to Rule 29 of the Rules of Practice and Procedure of the Florida Senate, sitting as a Court of Impeachment, and Rule 3.220 of the Florida Rules of Criminal Procedure, adopted therein, and hereby file this written response to Respondent's Demand for Discovery received the 4th day of August, 1978, as follows:

1. The Managers have voluntarily provided Respondent with materials in their possession with respect to Respondent Samuel S. Smith as of May 26, 1978. The following materials were provided on that date:

a. Deskbook of Senate Impeachment Trial.

b. Respondent's Motion to Dismiss and Brief in Support.

c. Managers' Reply Brief to Respondent's Motion to Dismiss.

d. Uniform Exhibits before the Court of Impeachment, Volume I.

e. Transcriptions of testimony (FBI Agent Richard Kirk, Sheriff Robert Leonard, Duke McCallister, Homer Franklin Ratliff, and Virlyn Willis).

f. Copies of transcripts of all known taped conversations involving Judge Samuel S. Smith.

g. Copies of the Chronology of Events before the House of Representatives when considering Articles of Impeachment.

h. Articles of Impeachment voted by the House of Representatives on April 12, 1978.

i. Audio taped copies of Judge Samuel S. Smith's conversation with Sheriff Leonard on the dates of September 10, 1976 and November 16, 1976.

2. The following materials which came into the possession and control of the Managers on August 7, 1978, are herewith furnished to Respondent:

a. Transcript of Pre-Trial Proceedings in *United States of America v. Smith.*

b. In Camera Proceedings of April 7, 1977, *United States of America v. Smith.*

c. All remaining materials in Volumes I through IX in the trial of *The United States of America v. Smith.*

3. The names and addresses of all persons known to the Board of Managers to have information which may be relevant to the Articles of Impeachment or any defense thereto, are herewith supplied in the form of a tentative witness list which is subject to further expansion.

4. The only statements in the possession of the Board of Managers or contemplated to be in the possession of the Board of Managers with respect to the names furnished in compliance with the preceding paragraph are in the form of transcribed testimony elicited in the trial of *The United States of America v. Samuel S. Smith*, United States District Court, Middle District of Florida, Jacksonville Division, No. 77-14Cr.-J-R and 77-14(S-Cr-J-R), concluded April 29, 1977. In this regard, the Managers have furnished copies of all such transcriptions in their possession and will make available copies of any and all other transcriptions received in the said above-cited case.

5. With respect to written and recorded statements and the substance of oral statements made by Respondent Samuel S. Smith, the Managers have provided known transcriptions of recorded conversations of September 9, 1976, September 10, 1976, September 22, 1976, November 16 a.m., 1976, and November

16 p.m., 1976. With respect to the foregoing, Managers have provided audio taped copies of the recorded conversations of September 10 and November 16 p.m., 1976, and will provide Respondent access to the other tapes when they are received in their possession.

6. Managers at this time have no tangible papers or objects which were obtained from or allegedly belong to the Respondent which were obtained by agents in connection with indictments previously returned against Respondent by the United States Government. Should such material come into the hands of the Managers, they will be made available to Respondent at the earliest possible date.

7. At this point in time, Managers possess no tangible papers or objects which are intended to be used at the trial which were obtained from or belong to any individual other than the Respondent. However, upon receipt of such materials, Respondent will be notified and the materials will be made available for his inspection.

8. Managers possess no criminal record or information from the Federal Bureau of Investigation concerning any witness the Managers intend to call.

9. The Managers have no material or information which has been provided by confidential informants.

10. As per paragraph 5 of this Response, Managers are in possession of materials which were the result of electronic surveillance. The transcriptions have already been forwarded, as have two of the five tapes. The remaining tapes will be copied and made available when they are received as will copies of Consent Forms signed by the other party or parties to the conversations.

11. To the best knowledge of the Managers, there has been no search and seizure involved in this case.

12. Reports of statements of experts or results of scientific tests will be made available if or as they are received.

13. To the best knowledge of the Managers, there is no information or materials in the Managers' possession or control which tends to negate the guilt of the Respondent.

Managers request, pursuant to Rule 3.220 of the Florida Rules of Criminal Procedure (b) (3), that within seven (7) days after receipt by Respondent of the materials disclosed in this Response, the Respondent shall furnish to Managers:

A. A written list of all witnesses whom the Respondent expects to call as witnesses at the trial or hearing.

B. Pursuant to Rule 3.220 (b) (4), in that Respondent demands discovery, under Section (a) (1) (ii), (x), (xi) of the Rules of Criminal Procedure, Managers request that they be permitted to inspect, copy, test and photograph the following information in the Respondent's possession or control:

1. The statement of any person whom the Respondent expects to call as a trial witness other than the Respondent.
2. Report of statements or exhibits made in connection with this particular case including results of physical or mental examinations and/or scientific tests, experiments or comparisons.
3. Any tangible paper or objects which the Defense Counsel intends to use in hearing or trial.

Dated this 10th day of August, 1978.

Marc H. Glick, Counsel to the Board of Managers on the Part of the Florida House of Representatives

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Response to Respondent's Demand for Discovery has been furnished to Honorable Ronald K. Cacciatore, Counsel for Respondent Samuel S. Smith, Suite 401, The Legal Center, 725 East Kennedy Boulevard, Tampa, Florida 33602, by hand delivery, this 11th day of August, 1978.

Marc H. Glick

NOTICE OF PRE-TRIAL CONFERENCE

To: The Honorable Samuel S. Smith
Circuit Judge, Third Judicial Circuit
4 Hillside Drive
Lake City, Florida 32055

Ronald K. Cacciatore, Esquire
Suite 401
The Legal Center
725 East Kennedy Boulevard
Tampa, Florida

Marc H. Glick, Esquire
Attorney for Board of Managers of
the House of Representatives
Room 208, House Office Building
Tallahassee, Florida 32304

YOU ARE HEREBY NOTIFIED that a pre-trial conference will be held in the above-styled cause in Room G, on the third floor of the Senate Office Building, Tallahassee, Florida, at 9:30 a.m. on Friday, August 18, 1978, before Chief Justice Arthur J. England, Jr., Presiding Officer. Matters to be considered include, at least: (1) lists of witnesses, including the designation of all expert witnesses; (2) stipulations of all exhibits; (3) objections to the admissibility of documents, exhibits, and other evidence; (4) stipulations and admissions of facts; (5) identification of legal issues to be tried by the Senate; (6) resolution of disputes, if any, concerning the applicability of the Florida Rules of Civil Procedure, Florida Rules of Criminal Procedure, and Rules 1, 5, 6, 8, and 10 of the Rules of the Florida Senate, 1976-78; (7) agreement on the arrangements for medcial aid to Samuel Smith; (8) closing of all pleadings; and (9) resolution of all other procedural matters.

PLEASE GOVERN YOURSELF ACCORDINGLY.

DATED: August 10, 1978

Arthur J. England, Jr.
Chief Justice

(SEAL)

Attest:
Joe Brown
Secretary of the Senate

INITIAL WITNESS LIST

The following is an Initial List of Witnesses tentatively scheduled to be called by the Board of Managers in the Senate Impeachment Trial of Third Judicial Circuit Court Judge Samuel S. Smith:

Baldwin, Agent Donald L.
Federal Bureau of
Investigation
Suite 880, Barnett Bank
Building
Tallahassee, Florida 32302

Cochran, Lt. Donald L.
Criminal Investigator
Union County Sheriff's
Department
Lake Butler, Florida 32054

Kirk, Agent Richard K.
Federal Bureau of Investigation
John F. Kennedy Federal Office Bldg.
Boston, Massachusetts 02203

Leonard, Sheriff Robert
Route 5, Box 285
Live Oak, Florida 32060

McCallister, Duke
Box 375
Live Oak, Florida 32060

Phillips, Agent John N.
Federal Bureau of Investigation
201 E. 69th Street
New York, New York 10021

Ramsey, Agent Gary M.
Federal Bur. of Investigation
Suite 880, Barnett Bank Bldg.
Tallahassee, Florida 32302

Ratliff, Homer Franklin
1206 South First Street
Lake City, Florida 32055

Rieder, Eugene W.
Chemist, Laboratory
Federal Bur. of Investigation
J. Edgar Hoover Building
Washington, D. C. 20535

Wade, Agent Ellis
Federal Bur. of Investigation
Oaks V, 4th Floor
7820 Arlington Expressway
Jacksonville, Florida 32211

Walton, Agent Kenneth P.
Federal Bur. of Investigation
J. Edgar Hoover Building
Washington, D. C. 20535

Willis, Virlyn D.
412 South Church Street
Lake City, Florida 32055

The foregoing list has been furnished to Respondent in Managers' Response to Demand for Discovery served on Respondent's Counsel, August 11, 1978.

Marc H. Glick, Counsel to the Board of Managers on the Part of the Florida House of Representatives

MOTION TO COMPEL DISCOVERY

COMES NOW the Respondent, SAMUEL S. SMITH, by and through his undersigned attorney, and pursuant to Rule 3.220 of the Florida Rules of Criminal Procedure, and hereby files this, his Motion to Compel Discovery, and would respectfully show as follows:

1. That on August 4, 1978, a Demand for Discovery was filed in this cause requesting the Board of Managers to furnish Respondent with the information contained within the Demand, and information which the Respondent is entitled to receive pursuant to the Florida Rules of Criminal Procedure.

2. That Rule 3.220(a)(1)(ii) of the Florida Rules of Criminal Procedure provides in part as follows: "The statement of any person whose name is furnished in compliance with the preceding paragraph. The term 'statement' as used herein means a written statement made by said person and signed or otherwise adopted or approved by him, or a stenographic, mechanical, electrical, or other recording, or a transcript thereof, or which is a substantially verbatum recital of an oral statement made by said person to an officer or agent of the State and recorded contemporaneously with the making of such oral statement . . .".

3. That Rule 3.220(a)(1)(iii) of the Florida Rules of Criminal Procedure provides as follows: "Any written or recorded statement and the substance of any oral statements made by the accused and known to the prosecutor, together with the name and address of each witness to the statement."

4. In the Response to the Demand for Discovery filed by the Board of Managers of the House of Representatives, dated August 10, 1978, provide that counsel for the Respondent has received copies of the transcriptions of the trial of the *United States of America v. Samuel S. Smith*, United States District Court, Middle District of Florida, Jacksonville Division, No. 77-14CR-J-R and 77-14(S-CR-J-R), which said transcription it has been alleged are the only transcriptions within the possession of the Board of Managers; with regard to the request for the "substance of any oral statements made by the accused and known to the prosecutor" the Board of Managers responded that certain taped copies of recorded conversation, and the transcriptions thereof, have been provided to counsel for the Respondent.

5. That counsel for the Respondent has learned through counsel for various Defendants in the aforementioned federal trial that several of the witnesses, whose names have previously been furnished by the Board of Managers, appeared and gave testimony in a Grand Jury proceeding, and that the names of those prospective witnesses whose Grand Jury testimony have previously been furnished to counsel for the Defendants during the aforementioned federal trial are as follows: Sheriff Robert Leonard, Duke McCallister, Homer Franklin Ratliff and Virlyn D. Willis. Counsel for the Respondent has further learned that Homer Franklin Ratliff, pursuant to a plea agreement with the United States Government, entered a plea in an in camera proceeding held in the United States District Court, a transcript of said proceeding having been furnished to defense counsel in the federal proceedings; counsel for the Respondent has further learned that at the time of the interview of the Respondent, at the time of his arrest, certain notes were made by officers of the Federal Bureau of Investigation and that the substance of the conversation with the Respondent was recorded in 302 notes, copies of said notes having previously been furnished to defense counsel during the proceedings of the federal trial.

6. Counsel for the Respondent now demands production of those materials specified in the preceding paragraph of this Motion, and counsel would respectfully show that the information sought is material to the Respondent's defense, that said information contains *Brady* material and that unless the Board of Managers is compelled to produce this information to the Respondent, the Respondent will be denied a fair trial and will be denied his due process rights pursuant to Article I, Section 16, Constitution of the State of Florida, and the Fourteenth Amendment to the Constitution of the United States. The Respondent will further be denied his Sixth Amendment rights to the Constitution of the United States if an Order compelling production of the requested materials is not forthcoming from this Honorable Court.

7. That the undersigned attorney has made a diligent effort to obtain the material requested in this Motion to Compel Discovery to no avail; that the undersigned attorney has written letters requesting the information sought from all defense counsel that participated in the federal trial conducted in Jacksonville, Florida; that on August 21, 1978, the undersigned counsel contacted attorney James O. Brecher, who recently represented the Respondent in another proceeding, and the undersigned counsel was advised by Mr. Brecher that all material previously furnished to defense counsel, which included Grand Jury testimony, a transcript of the in camera proceeding specifically mentioned above, and the FBI 302 notes, has been returned to the United States Attorney's Office pursuant to an Order previously entered by a United States Magistrate; Mr. Brecher advised the undersigned that even assuming some counsel still had this material requested, that because of the previously mentioned Order of the Court this material could not be furnished to the undersigned; that on August 21, 1978, the undersigned contacted John J. Daley, Esquire, the Assistant United States Attorney who represented the Government in the aforementioned federal trial; the said John J. Daley advised the undersigned that he would not furnish the material requested in this Motion to the undersigned attorney but that he, the said John J. Daley, upon

receiving a copy of an Order granting this Motion by this Honorable Court together with a request from the Board of Managers, would file an appropriate motion in the United States District Court seeking leave of the Court to furnish the material requested in this Motion to the Board of Managers.

8. Counsel for the Respondent would respectfully show that the material requested is wholly unavailable to Respondent but that said material is readily available to the Board of Managers through the procedure set forth in the preceding paragraph. That counsel for the Respondent certifies that he has reason to believe that the material requested contains *Brady* material and that said material contains "favorable evidence"; from conversations with attorney James L. Brecher on August 21, 1978, counsel concludes that the requested material was previously furnished to defense counsel in the aforementioned federal trial because said material either contained *Brady* material or said material constituted "Jencks Act" material.

9. Counsel for the Respondent would respectfully suggest that the fact this material was produced in a federal criminal trial suggests that the material should be produced in this proceeding, particularly in light of the fact that Discovery for all practical matters does not exist in a federal criminal proceeding.

WHEREFORE, the Respondent Samuel S. Smith respectfully prays this Honorable Court upon hearing this Motion, grant this Motion, and compel the Board of Managers to provide the information requested in this Motion to Respondent's counsel.

DATED this 22nd day of August, 1978.

Ronald K. Cacciatore
Attorney for Respondent

STATE OF FLORIDA
COUNTY OF HILLSBOROUGH

Before me, the undersigned authority, personally appeared RONALD K. CACCIATORE, who, after being duly sworn, deposes and says that the matters contained within the foregoing Motion to Compel Discovery are true and correct to the best of his knowledge and belief.

Ronald K. Cacciatore

Sworn to and subscribed before me this 22nd day of August, 1978.

Pamela Lynn Long
Notary Public, State of Florida at Large

CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to THE HONORABLE MARC H. GLICK, ESQUIRE, Attorney for the Board of Managers for the House of Representatives, 208 House Office Building, Tallahassee, Florida, 32304, by first class mail this 22nd day of August, 1978.

Ronald K. Cacciatore
Attorney

RESPONDENT'S LEGAL MEMORANDUM IN SUPPORT OF MOTION TO COMPEL DISCOVERY

The Respondent seeks to have the Board of Managers produce certain material which includes Grand Jury testimony of certain witnesses, 302 notes made by FBI agents concerning statements of certain witnesses, and the transcript of the in camera proceedings concerning the plea of guilty by Homer Franklin Ratliff. The Respondent submits that the importance and the necessity of having this material is obvious. To an appreciable degree, the case to be presented by the Board of Managers in this proceeding rests on the credibility of certain of the Managers' witnesses. Without the benefit of the materials requested, counsel for the Respondent will be unable to properly and effectively cross-examine these witnesses. Counsel for the Respondent would respectfully show that from a reading of the transcripts in the federal trial conducted in Gainesville, that several of the witnesses' testimony differed from testimony given before the Grand Jury.

The threshold question for the production of Grand Jury testimony appears to be whether a proper predicate has been laid for the production of the Grand Jury testimony. See *State v. McFarlane*, 318 So.2d 449 (2d DCA, Fla. 1975). *McFarlane, supra*, stands for the proposition that Rule 3.220(a)(1)(ii), R.Cr.P., does not require production of the statement of a witness when that statement happens to be a statement before a Grand Jury. While the Respondent disagrees with the ruling of the District Court of Appeal, the Respondent would respectfully submit that a proper predicate has been laid for the production of this material.

Respondent's counsel, by sworn affidavit, stated that attorney James O. Brecher, the Respondent's attorney in another proceeding, indicated that the material sought by the Motion to Compel Discovery contained *Brady* material. Certainly, Mr. Brecher, since he had the benefit of not only reading this material but also utilizing it at trial, would be in the best position to make a determination as to whether or not the material contained "favorable evidence."

In the Response to Demand for Discovery filed in this cause by the Board of Managers, the Managers state that "there is no information or materials in the Managers' possession or control which tends to negate the guilt of the Respondent."

The Respondent respectfully submits that the Managers have a duty to provide information which is "favorable evidence."

In *Brady v. Maryland*, 83 Sup.Ct. 1194 (1963) the Court stated:

> "We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of prosecution. . .".

The Courts in Florida have recognized the distinction between the terms "exculpatory evidence" and "favorable evidence". Generally, the Florida Courts have interpreted *Brady, supra,* and its teachings to mean more than simply the prosecution must produce evidence that clearly and unequivocally points to innocence or mitigation. See *State v. Gillespie*, 227 So.2d 550 (2d DCA, Fla. 1969).

In *Gillespie, supra,* the Court described "favorable evidence" as follows on page 556:

> "Thus, given the initial duty to disclose, the "favorable evidence" we are talking about is really that evidence which a reasonably skilled prosecutor should know could be fairly and probably used to advantage by the accused on the issues of guilt or punishment."

Therefore, Respondent respectfully suggests that he is entitled to the materials requested because these materials are contemplated by the discovery rule of the Florida Rules of Criminal Procedure and also the Respondent is entitled to receive the same as "favorable evidence."

At the Pretrial Conference, the representatives of the Board of Managers announced that they would oppose a Motion to Compel on the basis that copies of all materials in the Managers' files had been made available to counsel for Respondent. The Managers appear to take the position that simply because the materials requested is not under the Managers' immediate possession and direct control, that therefore, the materials requested is not contemplated by the discovery rule and therefore does not have to be produced.

The case of *State v. Coney*, 272 So.2d 550 (1st DCA Fla. 1973) answers the objections of the Board of Managers. In that case, the trial court had ordered the prosecution to provide criminal records of the State's witnesses. Said records were not actually in the possession of the State Attorney. On appeal, the Court held in *Coney, supra*, that not only was the State required to produce information directly in the State's actual possession and control but also the State was required to produce information it could obtain from the Federal Bureau of Investigation.

It is interesting to note that in *Coney, supra*, the Court found that a determination should first be made as to whether all or any part of the information sought by a defendant is readily available to him by the exercise of due diligence through deposition, subpoena or other means. Obviously, in this proceeding the materials sought and requested is not available through any means other than the production of this material by the Board of Managers.

In *Anderson v. State*, 241 So.2d 390 (Fla. 1970), the Supreme Court stated that the denial of timely discovery of evidence favorable to the accused which is otherwise unavailable to him may affect the fairness of the trial to such an extent that due process is denied.

The Respondent respectfully urges that a denial of the Motion to Compel Discovery will in effect be a denial of the Respondent's due process rights as guaranteed him not only by the Constitution of the State of Florida but the Constitution of the United States.

Rule 3.220(a)(1)(iii) of the Florida Rules of Criminal Procedure provides in part that the substance of any oral statement made by an accused shall be produced. Certainly, the Board of Managers cannot seriously contend that the Respondent is not entitled to review and have available the 302 note made by the agents of the Federal Bureau of Investigation at the time the Respondent allegedly made incriminating statements. Obviously, the Board of Managers are aware of the existence of these notes and of the alleged incriminating statements. The Respondent would respectfully urge that he is entitled 302 notes as being "the substance of any oral statements made by the accused" and upon the law and authority of *Lavigne v. State*, 349 So.2d 178 (1st DCA Fla. 1977) and *Stevens v. State*, 351 So.2d 1077 (3d DCA Fla. 1977).

In conclusion, the Respondent would respectfully urge that he has demonstrated that a proper predicate has been laid for the production of the material requested, that the material requested amounts to "favorable evidence", and that finally he will be denied his due process rights and that his Sixth Amendment Rights will be violated unless this Honorable Court enters an Order compelling production of the materials sought in the Motion to Compel Discovery.

Respectfully submitted,
RONALD K. CACCIATORE
Attorney for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to THE HONORABLE MARC H. GLICK, ESQUIRE, Attorney for the Board of Managers for the House of Representatives, 208 House Office Building, Tallahassee, Florida, 32304, by first class mail this 22nd day of August, 1978.

Ronald K. Cacciatore
Attorney

RESPONDENT'S LIST OF WITNESSES

COMES NOW SAMUEL S. SMITH, by and through his undersigned attorney, pursuant to Rule 29 of the Rules of Practice and Procedure when sitting on the Trial of Impeachments as adopted by The Florida Senate, and Rule 3.220(b)(3) of the Florida Rules of Criminal Procedure, and hereby files this, his List of Witnesses whom the Respondent expects to call as witnesses at the trial of this cause, together with their addresses, which are as follows:

1. Wade L. Griffin, 101 E. Madison Street, Lake City, Florida.

2. Donald R. Kennedy, Fairway View Drive, Lake City, Florida.

3. Grover Lamar Lee, 420 Hawkins Street, Live Oak, Florida.

4. Judge Declan O'Grady, Taylor County Courthouse, Perry, Florida.

5. Al Parker, General Delivery, Cross City, Florida.

6. Cleon Ratliff, c/o Columbia County Sheriff's Office, Lake City, Florida.

7. Rose Smith, 4 Hillside Drive, Lake City, Florida.

8. James Taylor, Florida Department of Criminal Law Enforcement, Suwannee County Courthouse, Live Oak, Florida.

9. Arthur Lawrence, State Attorney's Office, P.O. Box 1546, Live Oak, Florida.

10. Fred Morrison, RFD 1, Live Oak, Florida.

11. Danny Mott, Mott Buick Company, U.S. 90 West, Live Oak, Florida.

12. Leo Powell, P.O. Drawer 940, Live Oak, Florida.

13. Wyman Cheshire, P.O. Box 265, Lake City, Florida.

14. Buddy Lancaster, RFD 4, Box 165, Live Oak, Florida.

15. Juanita Small, P.O. Box 1546, Lake City, Florida.

16. Tom Abercrombie, P.O. Box 100, Live Oak, Florida.

17. Lee C. Willis, 11th Street, Live Oak, Florida.

18. Maxie Feagle, RFD 1, Box 308, High Springs, Florida. (lives in Columbia County, Florida).

DATED this 22nd day of August, 1978.

Ronald K. Cacciatore
Attorney for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to the HONORABLE MARC H. GLICK, ESQUIRE, Attorney for the Board of Managers of the House of Representatives, 208 House Office Building, Tallahassee, Florida, 32304, by first class mail this 22nd day of August, 1978.

Ronald K. Cacciatore
Attorney

RESPONDENT'S ADDITIONAL LIST OF WITNESSES

COMES NOW SAMUEL S. SMITH, by and through his undersigned attorney, pursuant to Rule 29 of the Rules of Practice and Procedure when sitting on the Trial of Impeachments as adopted by the Florida Senate, and Rule 3.220(b)(3) of the Florida Rules of Criminal Procedure, and hereby files this, his Additional List of Witnesses whom the Respondent expects to call as witnesses at the trial of this cause, together with their addresses, which are as follows:

1. Agent Charles R. Queener, FBI Office, Jacksonville, Florida.

2. Donald R. Kennedy, Public Defender's Office, Lake City, Florida.

DATED this 6th day of September, 1978.

Ronald K. Cacciatore
Attorney for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished to MARC H. GLICK, ESQUIRE, Attorney for the Board of Managers of the House of Representatives, 208 House Office Bldg., Tallahassee, Florida, 32304, by first class mail this 6th day of September, 1978.

Ronald K. Cacciatore
Attorney

RESPONDENT'S SECOND ADDITIONAL LIST OF WITNESSES

COMES NOW SAMUEL S. SMITH, by and through his undersigned counsel, pursuant to Rule 29 of the Rules of Practice and Procedure when sitting on the Trial of Impeachments as adopted by the Florida Senate, and Rule 3.220(b)(3) of the Florida Rules of Criminal Procedure, and hereby files this, his Second Additional List of Witnesses whom the Respondent expects to call as witnesses at the trial of this cause, together with their addresses, which are as follows:

1. Agent J. O. Jackson, Florida Department of Criminal Law Enforcement, Courthouse, Live Oak, Florida.

DATED this 8th day of September, 1978.

Ronald K. Cacciatore
Attorney for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished to MARC H. GLICK, ESQUIRE, Attorney for the Board of Managers of the House of Representatives, 208 House Office Bldg., Tallahassee, Florida, 32304, by first class mail this 8th day of September, 1978.

Ronald K. Cacciatore
Attorney

RESPONDENT'S THIRD ADDITIONAL LIST OF WITNESSES

COMES NOW SAMUEL S. SMITH, by and through his undersigned counsel, pursuant to Rule 29 of the Rules of Practice and Procedure when sitting on the Trial of Impeachments as adopted by The Florida Senate; and Rule 3.220(b)(3) of the Florida Rules of Criminal Procedure, and hereby files this, his Third Additional List of Witnesses whom the Respondent expects to call as witnesses at the trial of this cause, together with their addresses, which are as follows:

1. Milo Thomas, Esquire, Public Defender
Courthouse
Lake City, Florida

DATED this 10th day of September, 1978.

Ronald K. Cacciatore
Attorney for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished to MARC H. GLICK, ESQUIRE, Attorney for the Board of Managers of the House of Representatives, 208 House Office Building, Tallahassee, Florida, 32304, by first class mail this 10th day of September, 1978.

Ronald K. Cacciatore
Attorney

REPLY TO RESPONDENT'S MOTION TO COMPEL DISCOVERY

COMES NOW the Board of Managers on the Part of the Florida House of Representatives (hereinafter referred to as Managers), by and through their undersigned counsel, and pursuant to Rule 29 of the Rules of Practice and Procedure of the Florida Senate, sitting as a Court of Impeachment, and Rule 3.220 of the Florida Rules of Criminal Procedure, adopted therein, and hereby files this written Reply and Supporting Memorandum to Respondent's Demand to Compel Discovery received on the 22nd day of August, 1978, as follows:

1. The Managers have voluntarily provided Respondent with all materials in their possession bearing on the Impeachment Articles preferred against Samuel S. Smith.

2. The additional materials requested by the Respondent are not in the actual or constructive possession of the Managers inasmuch as they have been placed under seal by an Order of the United States District Court, Middle District of Florida, Jacksonville Division.

3. To obtain these materials the Assistant United States Attorney, John J. Daley, would be required to file an appropriate motion with the United States District Court and a corresponding order from that Court would need to issue. The said John J. Daley has indicated such a motion will be forthcoming only upon receipt of an Order of this Honorable Court granting Respondent's Motion compelling Managers to request the material so that Respondent may discover it. Even if said John J. Daley should make the appropriate Motion to the United States District Court, the Managers cannot assure this Honorable Court or Respondent that said Motion will be granted.

4. The Respondent has not shown nor do the Managers have reason to believe that the requested materials contain favorable material or exculpatory material. The Respondent was previously a defendant in the case of *United States of America v. Samuel S. Smith*, United States District Court, Middle District of Florida, Jacksonville Division, Case Nos. 77-14-Cr-J-T and 77-14(S)-Cr-J-T. The Managers have provided Respondent a full and complete transcript of that proceeding in which all evidence to be introduced against Respondent in the Impeachment trial is contained. The additional materials of which Respondent is seeking to compel discovery in this cause were available to and employed by Respondent in that earlier proceeding. All evidence and testimony in that

earlier proceeding was carefully scrutinized by five attorneys who had access to the requested materials and who conducted extensive cross-examination under oath. Surely, if the materials contained language favorable or exculpatory with respect to the Respondent, the record already provided Respondent's Counsel of that earlier trial would not be essentially void of reference thereto.

5. Even if such material is *Brady* or Jencks Act material as contended in Respondent's Motion to Compel Discovery, the Respondent has made no attempt to subpoena the requested material from the United States Attorney nor has the Respondent sought leave of the appropriate court to furnish the materials. The Respondent has standing in the United States District Court to request these materials and that Court is the proper forum for Respondent to seek them. It is not and should not be incumbent upon the Managers to pursue this matter on Respondent's behalf. The Managers have been extremely cooperative with the Respondent on all matters of discovery; however, it is not the responsibility of the Managers to assist Respondent's Attorney in the preparation of his case beyond that which is contemplated by the appropriate Rules of Procedure.

WHEREFORE, the Board of Managers respectfully prays this Honorable Court will deny Respondent's Motion to Compel Discovery.

Respectfully submitted,
Marc H. Glick, Counsel to the Board of Managers on the Part of the House of Representatives

CERTIFICATE OF SERVICE

I HEREBY certify that a true and correct copy of the foregoing Reply to Respondent's Motion to Compel Discovery has been furnished to Honorable Ronald K. Cacciatore, Attorney for Respondent, by United States Mail to Suite 401, 725 East Kennedy Boulevard, Tampa, Florida 33602, this 30th day of August, 1978.

Marc H. Glick

MEMORANDUM IN SUPPORT OF MANAGER'S REPLY TO RESPONDENT'S MOTION TO COMPEL DISCOVERY

The Respondent in this case, through Counsel, initially filed a Demand for Discovery on August 2, 1978 in which he requested extensive information from the Board of Managers.

In response to Respondent's Demand for Discovery, the Board of Managers (hereinafter referred to as Managers) provided the Respondent with all materials in their possession bearing on the Impeachment Articles preferred against Samuel S. Smith. The Respondent subsequently filed a Motion to Compel Discovery in an attempt to force the Managers to produce certain other material which includes Grand Jury testimony of certain witnesses, 302 notes made by Federal Bureau of Investigation Agents concerning statements of certain witnesses, and the transcript of the In Camera proceedings concerning the plea of guilty by Homer Franklin Ratliff. The Managers have replied to Respondent's Motion and would respectfully submit to the Court that the Managers are under no duty to produce this material since the material is not in the actual or constructive possession of the Managers and that Respondent has not exercised due diligence in exhausting his other remedies for discovering the material.

Counsel for the Respondent has alleged that the requested information contains *Brady* material and that without this information the Respondent will be denied due process rights pursuant to Article I, Section 16, Constitution of the State of Florida, and the Fourteenth Amendment to the Constitution of the United States. In *Brady v. Maryland*, 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963) the United States Supreme Court held that the suppression by the prosecution of evidence favorable to and requested by the accused violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution. The evidence which the prosecution had deliberately suppressed was an extrajudicial confession of the defendant's accomplice.

The issue the Court addressed in *Brady* is significantly different than the one facing this Court. The Managers are not making a deliberate attempt to suppress evidence which may be favorable to Respondent. Unlike the facts in *Brady*, this is not a case of a prosecutor having exclusive knowledge or possession of certain evidence which he refuses to share with the defendant. In this instance the Managers do not have the information, have never seen it, and object to the elaborate steps necessary to acquire the material on Respondent's behalf.

In *State v. Gillespie*, 227 So. 2d 550 (2nd D.C.A. 1969), the Florida District Court of Appeals discussed the *Brady* case in terms of its impact on Florida Criminal Procedure. Much of what the Court discussed in *Gillespie* is relevant to the matter at hand:

> But our view taken here of the entire rationale of *Brady* is that the "favorable evidence" spoken of must necessarily include, if not indeed exclusively concern itself with, work product of the prosecution in the broadest sense, since the evidence involved is that known to, and ascertained by, the prosecution but unavailable to the accused. p. 556

In the instant case the requested material was gathered by the United States Attorney's Office in preparation of a previous case and is not the work product of the Board of Managers. The Court in *Gillespie* also made an observation that is relevant to the issue before this Court:

> Secondly, we note that in all the cases from which pre-trial discovery has evolved, it appears that the prosecution took unfair advantage of the accused by either knowingly presenting false or illegally obtained evidence against him in some manner, and without disclosure thereof, or by unfairly suppressing exculpatory or favorable evidence. Therefore, common to all these cases is the fact that the evidence in question was otherwise unavailable to the accused. p. 554

There have been no attempts made by the Managers to take unfair advantage of the Respondent by suppressing evidence in their possession. Just what the limits of discovery are in light of the *Brady* decision has never been addressed. Four years after *Brady* the United States Supreme Court in *Giles. v. Maryland*, 386 U.S. 66, 17 L. Ed 2d. 737, 87 S. Ct. 793 (1967), refused to set forth any guidelines for reasonable discovery at that time. This was recognized in Florida by the First District Court of Appeals in *State v. Pitts*, 241 So. 2d 399 (1 D.C.A. 1970):

> The United States Supreme Court has declined to determine whether the prosecutions' duty to voluntarily disclose extends to all evidence admissible and useful to the defense and what degree of prejudice must be shown to make necessary a new trial. p. 412

In 1976 the United States Supreme Court narrowed the *Brady* decision even further. In *United States v. Agurs*, 427 U.S. 97, 49 L. Ed. 2d. 342, 96 S. Ct. 2392 (1976), the Court held that whether or not procedural rules authorizing discovery

of everything that might influence a jury might be desirable, the Constitution does not demand such broad discovery. The Court further held that the mere possibility that an item of undisclosed information might have aided the defense, or might have affected the outcome of a trial, does not establish "materiality" in the constitutional sense.

Another issue facing this Court is whether or not the Managers have possession of the material requested by Respondent. The Respondent does not dispute the Managers' claim that the material is not in their actual possession. The issue raised by Respondent is that the Board has constructive possession of the material by virtue of it being under the control of another law enforcement agency.

Respondent relies on *State v. Coney*, 272 So. 2d 550 (1 D.C.A. 1973) in support of his contention that the requested material is in the constructive possession of the Managers. In that case the First District Court of Appeal held that the criminal records of the state's witnesses were in the constructive possession of the State Attorney by virtue of the fact that the State Attorney had easy access to the records of the Federal Bureau of Investigation. A closer look at the *Coney* case reveals significant differences between it and the situation at hand. The court referred to records which were wholly unavailable to the defendant but readily available to the State. The information which the defendant had requested was information of the Federal Bureau of Investigation which the Court said was "quickly and effortlessly obtained by pushing a button in the computer." (p. 553) Thus the information could easily be obtained by the State "without burdening to any great extent the office of the State Attorney." (p. 553) The Court also spoke of a compact arrangement between the State Attorney and the Federal Bureau of Investigation whereby information could be readily procured.

The facts in the matter before this Court are very different than those in *Coney*. The material which the Respondent has requested is not information which can be reached by "pushing a button" nor is it readily available to the Managers. The burden on the Managers to pursue the procedural steps necessary to obtain the information would be great. The information is under seal by the United States District Court and the Managers have no assurance that they could obtain this material even if they should request. In addition, because of the unique nature of impeachment proceedings, the Managers do not have a similar compact arrangement with the Federal Bureau of Investigation as does the State Attorney's Office.

The *Coney* decision was subsequently affirmed in the Florida Supreme Court in *State v. Coney*, 294 So. 2d 82 (Fla. 1974) In a Per Curiam Opinion on Rehearing, the Court seemed to narrow its previous opinion by confining the definition of actual or constructive possession to the facts of the case at page 87:

> Criminal records of potential State witnesses are in the "actual or constructive possession" of the State only if:
>
> (1) the records are in the physical possession of any state prosecutorial or law enforcement office; or
>
> (2) the fingerprints of the witness are already within the physical possession of any such office and this fact is known to the office of the State Attorney, thus giving the State access to the information by way of state and federal compacts through a system based on fingerprints; or
>
> (3) the State is able to obtain the fingerprints of the witness by his own voluntary cooperation.

The Court said that this procedure would "avoid any requirement that the prosecuting attorney 'prepare' " the case on behalf of the defendant. That the Court found it necessary to clarify its opinion seems to indicate their unwillingness to extend the definition of constructive possession beyond the three specified circumstances. The material that the Respondent has requested does not fall into any of these classifications as the material is under the seal of the United States District Court.

The Managers would also dispute Respondent's claim that the materials are not available through other means of discovery. The information which the Respondent has requested has been placed under seal by the United States District Court and thus not readily accessible to either party. The Managers argue that the Respondent has as much, if not more, standing than they to request a release of the information by the District Court.

Furthermore, the Respondent has not shown nor do the Managers have reason to believe that the requested materials contain favorable material or exculpatory material. The Respondent was previously a defendant in the case of *United States of America v. Samuel S. Smith*, United States District Court, Middle District of Florida, Jacksonville Division, Case Nos. 77-14-Cr-J-T and 77-14(S)-Cr-J-T. The Managers have provided Respondent a full and complete transcript of that proceeding in which all evidence to be introduced against Respondent in the Impeachment trial is contained. The additional materials of which Respondent is seeking to compel discovery in this cause were available to and employed by Respondent in that earlier proceeding. All evidence and testimony in that earlier proceeding was carefully scrutinized by five attorneys who had access to the requested materials and who conducted extensive cross-examination under oath. Surely, if the materials contained language favorable or exculpatory with respect to the Respondent, the record already provided Respondent's Counsel of that earlier trial would not be essentially void of reference thereto.

In conclusion, the Managers would respectfully urge this Court to deny Respondent's Motion to Compel Discovery.

Respectfully submitted,
Marc H. Glick, Counsel to the Board of Managers on the Part of the House of Representatives

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Memorandum in Support of Managers' Reply to Respondent's Motion to Compel Discovery has been furnished by United States Mail to Honorable Ronald K. Cacciatore, Attorney for Respondent, Suite 401, 725 East Kennedy Boulevard, Tampa, Florida 33602, this 30th day of August, 1978.

Marc H. Glick

ORDER ON MOTION TO COMPEL DISCOVERY

WHEREAS, respondent Samuel S. Smith filed with the Court a Motion to Compel Discovery of materials alleged to contain evidence "favorable" to respondent's defense in this proceeding, within the contemplation of *Brady v. Maryland*, 373 U.S. 83 (1963), together with an accompanying legal memorandum; and

WHEREAS, the Board of Managers on the Part of the House of Representatives has filed with the Court a reply and legal memorandum opposing the production of the materials requested; and

WHEREAS, the undersigned as Presiding Officer in this proceeding has duly considered the issues presented;

NOW THEREFORE, the undersigned hereby finds and orders as follows:

1. Respondent has requested from the Board of Managers (i) Grand Jury testimony of certain witnesses in *United States of America v. Samuel S. Smith*, U.S. District Court, Middle District of Florida, Jacksonville Division, No. 77-14CR-J-R and 77-14(S-CR-J-R), (ii) 302 notes made by agents of the Federal Bureau of Investigation, and (iii) a transcript of in-camera proceedings at which Homer Franklin Ratliff entered a guilty plea in the named proceeding, all of which are more particularly described in paragraph 5 of respondent's motion (a copy of which is attached to this order).

2. All requested materials were previously furnished to defense counsel for respondent in the named federal proceeding but are unavailable to either the Board of Managers or respondent inasmuch as they are now held by the United States Attorney pursuant to an ensealing order of the United States District Court.

3. That the Board of Managers has not deliberately attempted to deny respondent access to the requested materials nor in any way endeavored to impede respondent's discovery; rather, the Board of Managers has asserted its inability to comply with respondent's request and has denied any responsibility on its part to initiate on respondent's behalf a request for materials in the possession and control of the United States government.

4. That respondent has made an adequate showing that the requested materials may contain evidence favorable to respondent's defense in this proceeding, and that respondent is entitled to review the materials requested prior to his impeachment trial.

5. Respondent should not be precluded from securing access to the requested materials by reason of having been furnished a complete transcript of the federal proceeding named above.

6. In light of the imminence of respondent's trial, access to the requested materials should be secured expeditiously by whatever means are efficacious, without regard to any alleged failure by respondent to exhaust alternate methods of securing them for review.

7. Accordingly, respondent's Motion to Compel Discovery of the enumerated materials is hereby granted, and both respondent and the Board of Managers are directed to request from the United States District Court, in whatever manner may be appropriate, all materials identified in paragraph 5 of respondent's motion.

It is so ordered.

Arthur J. England, Jr.
Chief Justice
Supreme Court of Florida
Presiding Officer

NOTICE OF TAKING DEPOSITION

TO: MARC H. GLICK, ESQUIRE
Counsel for the Board of Managers
of the House of Representatives

YOU WILL PLEASE TAKE NOTICE that the Defendant will take the deposition of the following listed persons at the times indicated, by oral examination for discovery purposes, for use as evidence at the trial of the above-styled cause or both, before a person authorized by law to take depositions at the Office of the State Attorney, Third Judicial Circuit, Live Oak, Florida, on Friday, September 1, 1978, pursuant to the Florida Rules of Criminal Procedure:

1. Sheriff Robert Leonard — 9:30 a.m.
Rt. 5, Box 285
Live Oak, Florida 32060

2. Duke McCallister — 11:30 a.m.
Box 375
Live Oak, Florida 32060

3. Homer Franklin Ratliff — 1:30 p.m.
1206 South First Street
Lake City, Florida 32055

4. Arthur Lawrence — 2:30 p.m.
State Attorney's Office
Live Oak, Florida 32060

5. Virlyn D. Willis — 3:30 p.m.
412 South Church Street
Lake City, Florida 32055

6. Agent Gary M. Ramsey — 4:30 p.m.
Federal Bureau of Investigation
Suite 880
Barnett Bank Building
Tallahassee, Florida 32302

PLEASE BE GOVERNED ACCORDINGLY.

Ronald K. Cacciatore
Attorney for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished to THE HONORABLE MARC H. GLICK, ESQUIRE, Attorney for the Board of Managers of the House of Representatives, 208 House Office Building, Tallahassee, Florida, 32304, by first class mail this 22nd day of August, 1978.

Ronald K. Cacciatore
Attorney

MOTION FOR PROTECTIVE ORDER

COMES NOW the Board of Managers on the Part of the House of Representatives, by and through its undersigned Counsel, and pursuant to Rule 3.220 of the Florida Rules of Criminal Procedure, and hereby files this, its Motion for Protective Order, and would respectfully show as follows:

1. That on August 22, 1978, a Notice of Taking Depositions was filed in this cause advising that the Respondent will take depositions by oral examination at the Office of the State Attorney, Third Judicial Circuit, Live Oak, Florida, on Friday, September 1, 1978, of the following witnesses: Sheriff Robert Leonard, Duke McCallister, Homer Franklin Ratliff, Arthur Lawrence, Virlyn D. Willis, and Agent Gary M. Ramsey.

2. That Rule 3.220 (d) of the Florida Rules of Criminal Procedure, provides in part as follows: "After notice to the parties the court may, for good cause shown, extend or shorten the time and may change the place of taking . . . A resident of the state may be required to attend an examination only in the county wherein he resides, or is employed, or regularly transacts his business in person."

3. That Homer Franklin Ratliff and Virlyn D. Willis reside in Lake City in Columbia County, Florida, and are not employed, nor do they regularly transact business in person, in Suwannee County, Florida. Agent Gary M. Ramsey resides in Tallahassee, Leon County, Florida, and is not employed, nor does he regularly transact business in person, in Suwannee County, Florida.

4. That Rule 3.220 (h) of the Florida Rules of Criminal Procedure, provides in part as follows: "Upon a showing of cause, the court may at any time order that specified disclosures be restricted or deferred, or make such order as appropriate . . .".

5. That the Board of Managers on the Part of the House of Representatives has provided Counsel for the Respondent with copies of the transcriptions of the trial of the *United States of America v. Samuel S. Smith,* United States District Court, Middle District of Florida, Jacksonville Division, No. 77-14-Cr-J-T and 77-14(S)-Cr-J-T, which said transcriptions contain the complete direct testimony and cross-examination of each of the witnesses herein named sought for deposition by Counsel for the Respondent.

6. That the Articles of Impeachment in the present cause are limited solely to matters in evidence in the above-cited trial of *United States of America v. Samuel S. Smith.*

7. Counsel for the Board of Managers on the Part of the House of Representatives now moves this Honorable Court for an order directing that the depositions of Homer Franklin Ratliff and Virlyn D. Willis be taken in Lake City, Columbia County, State of Florida, instead of Live Oak, Suwannee County, State of Florida, at a time and place to be determined, on the grounds that said deponents reside in Lake City. Counsel for the Board of Managers on the Part of the House of Representatives further moves this Honorable Court for an order directing that the deposition of Agent Gary M. Ramsey be taken in Tallahassee, Leon County, State of Florida, instead of Live Oak, Suwannee County, State of Florida, at a time and place to be determined, on the grounds that Agent Ramsey resides in Tallahassee.

8. Counsel for the Board of Managers on the Part of the House of Representatives also moves for an order directing that Respondent, in taking the depositions of Sheriff Robert Leonard, Duke McCallister, Homer Franklin Ratliff, Arthur Lawrence, Virlyn D. Willis, and Agent Gary M. Ramsey, shall not inquire into any items outside those matters in evidence at the trial of Respondent in *United States of America v. Samuel S. Smith,* United States District Court, Middle District of Florida, Jacksonville Division, No. 77-14-Cr-J-T and 77-14(S)-Cr-J-T, for the reason that the Impeachment Trial, by virtue of the Articles of Impeachment is limited to such matters.

9. The undersigned attorney would also respectfully inform this Honorable Court that Agent Gary M. Ramsey has advised that he intends to follow the procedures outlined in Sections 16.21-16.26, Title 28, Code of Federal Regulations, with respect to disclosure by employees of the Department of Justice in response to subpoenas or demands of a court for discovery.

WHEREFORE, the Board of Managers on the Part of the House of Representatives respectfully prays this Honorable Court upon considering this Motion, grant this Motion, and issue a Protective Order changing the location of the depositions and limiting the scope of the depositions as requested in this Motion.

Dated this 28th day of August, 1978.

Respectfully submitted,
Marc H. Glick, Counsel to the Board of Managers on the Part of the House of Representatives

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion for Protective Order has been furnished by U. S. Mail to Honorable Ronald K. Cacciatore, Attorney for Respondent, 725 East Kennedy Boulevard, Tampa, Florida 33602, this 28th day of August, 1978.

Marc H. Glick

ORDER ON MOTION FOR PROTECTIVE ORDER

The Board of Managers on the Part of the House of Representatives has filed a Motion for Protective Order relating to discovery by way of depositions in this proceeding. The Presiding Officer having been advised that counsel for the Board of Managers and counsel for respondent Samuel S. Smith have amicably resolved all matters raised in the Motion except the Board of Managers' request that respondent's inquiries on deposition be limited in scope, it is

ORDERED that the Board of Managers' request for a protective order is granted, and respondent shall limit his inquiry in taking the depositions of Sheriff Robert Leonard, Duke McCallister, Homer Franklin Ratliff, Arthur Lawrence, Virlyn D. Willis, and Agent Gary M. Ramsey to matters directly related to the charges set forth in the Articles of Impeachment, and to matters reasonably related thereto which may be necessary for the preparation of respondent's defense of the charges against him.

Arthur J. England, Jr.
Chief Justice
Supreme Court of Florida
Presiding Officer

MOTION TO TAKE DEPOSITION TO PERPETUATE TESTIMONY

COMES NOW the Respondent, SAMUEL S. SMITH, by and through his undersigned attorney, pursuant to Rule 29 of the Rules of Practice and Procedure when sitting on the Trial of Impeachments as adopted by The Florida Senate, and Rule 3.190(j) of the Florida Rules of Criminal Procedure, and files this, his Motion to Take Deposition to Perpetuate Testimony, and for grounds therefor would respectfully show unto the Court as follows:

1. That the Respondent has filed a Motion for Continuance of Trial Date, which said Motion has been supported in part by the Affidavit of Dr. Lamar Crevasse of Shands Teaching Hospital and who resides in Gainesville, Florida.

2. That in view of the conversations engaged in at the Pretrial Conference, it is apparent to the undersigned attorney that it may be necessary to present medical testimony to The Senate on September 13, 1978 for The Senate's consideration of the Motion for Continuance of Trial Date.

3. That the undersigned attorney would certified that he personally conversed with Dr. Lamar Crevasse on Monday, August 28, 1978 and learned that the said Dr. Crevasse is leaving the State of Florida on Sunday, September 3, 1978 and will be gone for approximately one month; that because of this medical expert's plans to be absent from the State of Florida on September 13, 1978, the Respondent has no way to call said medical expert as a witness in his behalf on the Motion for Continuance of Trial Date if the same becomes necessary.

4. The Respondent respectfully suggests that the granting of this Motion to Take Deposition to Perpetuate Testimony of Dr. Lamar Crevasse will preserve the rights of the Respondent as they pertain to his Motion for Continuance of Trial Date.

5. That counsel for the Board of Managers and the undersigned counsel have agreed to take the deposition of Dr. Lamar

Crevasse in Gainesville, Florida on Thursday, August 31, 1978 for the purpose of perpetuating the testimony of said medical expert.

6. The undersigned attorney would further represent that the testimony of Dr. Lamar Crevasse is material to the Motion for Continuance and that it is necessary to take his deposition to prevent a failure of justice.

WHEREFORE, the Respondent Samuel S. Smith respectfully prays this Honorable Court will enter an Order granting the Respondent the right to take the deposition of Dr. Lamar Crevasse for the purpose of perpetuating his testimony in this cause.

DATED this 29th day of August, 1978.

Ronald K. Cacciatore
Attorney for Respondent

STATE OF FLORIDA
COUNTY OF HILLSBOROUGH

Before me this day personally appeared RONALD K. CACCIATORE, who, after being duly sworn by me, deposes and says that the matters contained within the foregoing Motion to Take Deposition to Perpetuate Testimony are true and correct to the best of his knowledge and belief.

Ronald K. Cacciatore

Sworn to and subscribed before me this 29th day of August, 1978.

Pamela Lynn Long
Notary Public, State of Florida at Large.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to MARC H. GLICK, ESQUIRE, Attorney for the Board of Managers of the House of Representatives, 208 House Office Building, Tallahassee, Florida, 32304, by first class mail this 29th day of August, 1978.

Ronald K. Cacciatore
Attorney

NOTICE OF TAKING DEPOSITION

TO: MARC H. GLICK, ESQUIRE
Counsel for the Board of Managers
of the House of Representatives

YOU WILL PLEASE TAKE NOTICE that the Respondent will take the deposition of Dr. Lamar Crevasse on Thursday, August 31, 1978 at 5:00 p.m. at the Shands Teaching Hospital Cardiology Office, 4th Floor, Gainesville, Florida, for the purpose of perpetuating the testimony of Dr. Crevasse in compliance with Rule 3.190(j) of the Florida Rules of Criminal Procedure, before a certified Court Reporter.

PLEASE BE GOVERNED ACCORDINGLY.

Ronald K. Cacciatore
Attorney for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished to the above-named addressee by first class mail this 29th day of August, 1978.

Ronald K. Cacciatore

ORDER TO PERPETUATE TESTIMONY

Respondent Samuel S. Smith, seeking to preserve the testimony of Dr. Lamar Crevasse for use at trial, has filed a Motion to Take Deposition to Perpetuate Testimony pursuant to Rule 3.190 of the Florida Rules of Criminal Procedure. Respondent indicates that Dr. Lamar Crevasse will be absent from the State of Florida for approximately one month, including the date of trial; that his testimony is material to Respondent's Motion for Continuance of Trial Date and necessary to preserve the rights of Respondent; and that counsel for the Board of Managers offers no objection to the perpetuation of said testimony. Therefore, it is

ORDERED that Respondent's motion to perpetuate testimony is granted. The oral deposition of Dr. Lamar Crevasse shall be taken on August 31, 1978, before the court reporter of The Florida Senate for the purpose of preserving said deponent's testimony for trial.

It is so ordered, August 31, 1978.

Arthur J. England, Jr.
Chief Justice
Supreme Court of Florida
Presiding Officer

MOTION FOR CONTINUANCE OF TRIAL DATE

COMES NOW the Respondent, SAMUEL S. SMITH, by and through his undersigned attorney, pursuant to Rule 29 of the Rules of Practice and Procedure when sitting on the Trial of Impeachments as adopted by The Florida Senate, and Rule 3.190-(g) of the Florida Rules of Criminal Procedure and files this, his Motion for Continuance of Trial Date, and as for grounds therefor would respectfully show unto the Court as follows:

1. That the Impeachment Trial in this cause has been scheduled for trial in The Florida Senate on September 13, 1978.

2. That the Respondent, Samuel S. Smith, is suffering from a severe illness or disease for which he is presently receiving medical treatment and advice; the Respondent is suffering from an unstable cardiac condition; that in the past the Respondent has experienced two cardiac arrests, which very nearly resulted in his death, one of which occurred on August 16, 1973 and the other on May 30, 1974.

3. That the Respondent has received medical advice from three medical experts to avoid the stress or strain of any further Court proceedings for approximately three months because of the strong possibility that such stress or strain might cause the Respondent to suffer and experience a Myocardial Infarction, Cardiac Arrest and sudden death.

4. That the Respondent's treating physicians, Dr. L. G. Landrum and Dr. Lamar Crevasse, have advised your Respondent not to participate, nor to be present, in the Impeachment Trial and Proceedings scheduled to begin on September 13, 1978 in The Senate. That attached hereto and made a part hereof by reference is the original of an Affidavit signed by Dr. L. G. Landrum on August 23, 1978, which said Affidavit states that the Respondent should not be subjected to any stress or strain of further Court proceedings for at least three months because of the strong possibility of Myocardial Infarction, Cardiac Arrest and sudden death syndrome. Said attached Affidavit from Dr. L. G. Landrum further indicates that his medical opinion is shared by two other medical experts, to wit: Dr. Lamar Crevasse and Dr. John T. Patterson.

5. That attached hereto and made a part hereof by reference is an Affidavit by Dr. Lamar Crevasse dated August 25, 1978,

which said Affidavit states that the Respondent should not be subjected to any stress or strain of further Court proceedings for at least three months. The attached Affidavit of Dr. Lamar Crevasse further indicates that there is a strong possibility of the Respondent experiencing Myocardial Infarction, Cardiac Arrest and sudden death.

6. That attached hereto and made a part hereof by reference is a copy of a letter to Joseph C. Jacobs, Esquire, from Dr. L. G. Landrum dated August 10, 1978, in which said letter Dr. L. G. Landrum states that he has conferred with Dr. John T. Patterson of Metairie, Louisiana, and that it was the opinion of Dr. John T. Patterson that the Respondent should not be subjected to any stress or strain of any further Court proceedings for approximately eight or twelve weeks.

7. In support of this Motion for Continuance of Trial Date, there is attached hereto and made a part hereof by reference a letter to Dr. L. G. Landrum from Dr. John T. Patterson dated June 30, 1978, together with copies of the Respondent's admission history, physical, discharge summary and copies of various Electrocardiograph Reports.

8. That in support of this Motion for Continuance of Trial Date, the Respondent requests that this Honorable Court consider those medical records which are contained in the Uniform Exhibits Before the Court of Impeachment as if said records were attached hereto and made a part hereof by reference, which said records include a letter to Joseph C. Jacobs from Dr. L. G. Landrum dated February 10, 1978, a letter to Mr. David W. Ragsdale from Dr. L. G. Landrum dated February 28, 1977, a discharge summary dated August 23, 1973 and discharge summaries prepared in 1974.

9. That as a result of the Respondent's medical history, his present unstable cardiac condition, and in view of the two attached supporting Affidavits, the Respondent respectfully requests that the trial of this cause be continued for approximately three months from the date of this Motion, and that further, at the end of said three months period, that this Court or the Senate receive medical evidence at that time so that a determination can be made as to whether the Respondent will be able to participate in an Impeachment Trial at that time. That the Respondent respectfully suggests that a denial of this Motion will be a denial of his Due Process rights guaranteed to the Respondent by both the Constitution of the State of Florida and the Constitution of the United States, and will deny the Respondent the right to the effective assistance of counsel and the right to confront the witnesses that appear against him as guaranteed to the Respondent by the Sixth Amendment of the Constitution of the United States.

10. That the Respondent would respectfully show that in the event he ignores the medical advice he has received from his treating physicians he runs the risk of not only harming himself physically but of literally killing himself because of his unstable cardiac condition. On the other hand, if the Respondent follows the sound medical advice of his physicians, he will not be physically able to be present at the trial of this cause, not be able to fully participate in the defense of his cause and not be able to properly assist his undersigned counsel in an effective defense to those allegations and charges contained within the Articles of Impeachment.

11. That the undersigned attorney respectfully certifies that this Motion for Continuance is made in good faith and is made for no other reasons other than those set forth herein above in this Motion.

WHEREFORE, the Respondent, Samuel S. Smith, respectfully prays that this Honorable Court or The Florida Senate will grant this Motion and the relief prayed for in this Motion.

DATED this 29th day of August, 1978.

Ronald K. Cacciatore
Attorney for Respondent

STATE OF FLORIDA
COUNTY OF HILLSBOROUGH

Before me this date personally appeared RONALD K. CACCIATORE, who, after being first duly sworn, deposes and says that the matters contained within the foregoing Motion for Continuance of Trial Date are true and correct to the best of his knowledge and belief.

Ronald K. Cacciatore

Sworn to and subscribed before me this 29th day of August, 1978.

Pamela Lynn Long
Notary Public, State of Florida at Large

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished to MARC H. GLICK, ESQUIRE, Attorney for the Board of Managers of the House of Representatives, 208 House Office Building, Tallahassee, Florida, by first class mail this 29th day of August, 1978.

Ronald K. Cacciatore
Attorney

A F F I D A V I T

STATE OF FLORIDA
COUNTY OF COLUMBIA

BEFORE ME, the undersigned authority, this day personally appeared L. G. LANDRUM, who after being by me first duly sworn, states:

1. I am a medical doctor and have practiced medicine in the State of Florida since 1948.

2. SAMUEL S. SMITH has been my patient since 1960.

3. Together with DR. LAMAR CREVASSE, M.D., a cardiologist in Gainesville, Florida, I have treated MR. SMITH for his heart condition. His relevant medical history includes two cardiac arrests, which very nearly resulted in his death, one of which occurred on August 16, 1973 and the other on May 30, 1974.

4. While in New Orleans, Louisiana this past June, 1978, MR. SMITH was hospitalized for 17 days suffering from severe chest pains, and was treated by DR. JOHN T. PATTERSON of that City.

5. Currently, MR. SMITH is having increased attacks of angina, requiring Nitroglycerine several times a day and he is often awakened during the night with chest pains and has to take Nitroglycerine for relief. His regular medicine includes Inderal 10 mgs. QID, and I increased this to 20 mgs. Q6H to try to prevent angina and Isordil 10 mgs. TID; Nitroglycerine SL PRN, and Dyazide 2 QD for his blood pressure.

6. MR. SMITH's angina pains persisted and on August 22, 1978 I prescribed NITRO-BID tm Ointment.

7. His most recent EKG in my office still reflects the old Inferior Infarction, and Dr. Patterson and his colleagues feel that MR. SMITH may have had an Anterior Infarction at some time or other. His blood pressure is 155/100 which is high.

8. At the present time, MR. SMITH is mentally depressed, which obviously will affect his cardiac status and make him more subject to cardiac complications.

9. DR. CREVASSE, DR. PATTERSON and I all concur that MR. SMITH should not be subjected to any stress or strain of further Court proceedings for at least another three months because of the strong possibility of Myocardial Infarction, Cardiac Arrest and Sudden Death Syndrome. At the end of three months, MR. SMITH's condition should be re-evaluated.

L. G. Landrum, M.D.

Sworn to and subscribed before me
this 23rd day of August, 1978.

Anne Herlong
Notary Public

A F F I D A V I T

STATE OF FLORIDA
COUNTY OF ALACHUA

BEFORE ME, the undersigned authority, this day personally appeared LAMAR CREVASSE, M.D., who after being by me first duly sworn, states:

1. I am a medical doctor and board certified Cardiologist.

2. SAMUEL S. SMITH became my patient, and has been under my care since suffering a cardiac arrest on August 16, 1973.

3. I have read the Affidavit of L. G. LANDRUM, M.D., dated August 23, 1978.

4. I specifically concur that MR. SMITH should not be subjected to any stress or strain of further Court proceedings at this time, and for at least three months since he has developed unstable angina with recurrent daily chest pains at night, at rest or under slight exertion or emotional stress. There is a change in his cardiac status and indicates a strong possibility of another Myocardial Infarction, Cardiac Arrest and Sudden Death.

Lamar Crevasse, M.D.

Sworn to and subscribed before me this 25th day of August, 1978.

Carl B. Young
Notary Public

DEMAND TO STRIKE RESPONDENT'S MOTION FOR CONTINUANCE OF TRIAL DATE

COMES NOW the Board of Managers on the Part of the Florida House of Representatives (hereinafter referred to as Managers), by and through their undersigned counsel, pursuant to Rule 29 of the Rules of Practice and Procedure of the Florida Senate Sitting as Court of Impeachment, Rule 1.380(b)(2), (d) of the Florida Rules of Civil Procedure, and Rule 3.220(b)(1)(ix) of the Florida Rules of Criminal Procedure, and files this their Demand to Strike Respondent's Motion for Continuance of Trial Date, and as grounds therefor, would respectfully show the Court as follows:

1. On August 4, 1978, Respondent moved for Discovery of all Materials in the Managers' Possession.

2. Pursuant to Respondent's Motion, Managers complied in full and filed their Response to Demand for Discovery on August 10, 1978, setting out their claim for reciprocal discovery which included all discovery available to them under Rule 3.220 of the Florida Rules of Criminal Procedure.

3. On August 22, 1978, Respondent filed a Motion to Compel Discovery and Managers replied thereto on August 30, 1978, setting out that they did not have the requested materials as the materials were in the possession of the U. S. Government.

4. On August 31, 1978, an Order of the Court instructed the Managers to join with Respondent in seeking the materials desired by Respondent from the United States Government. The Managers cooperated fully.

5. On August 29, 1978, Respondent filed a Motion for Continuance of Trial Date, to which Managers have filed a reply, alleging as grounds therefor that Respondent's health would not permit him to stand trial.

6. Respondent next filed a Request to Perpetuate the Testimony and Take the Deposition of Respondent's Doctor, Lamar E. Crevasse, in Gainesville. Managers filed no objection and in every way aided the taking of said deposition.

7. Pursuant to the Motion for Continuance and in light of their continuing and absolute cooperation, and under Rules of Discovery available to them after having complied with every discovery request of Respondent, Managers on September 5, 1978, filed a Demand for Independent Physical Examination of Respondent.

8. On September 6, 1978, Chief Justice Arthur England, Jr., Presiding Officer of the Florida Senate Sitting as Court of Impeachment, ruled thusly:

"ORDERED that Samuel S. Smith shall submit to an examination by John L. Wilson, M.D., Cardiologist, at 1308 Hodges Drive, Tallahassee, Florida, on Thursday, September 7, 1978, at 10:00 a.m., and that respondent shall provide Dr. Wilson with all relevant medical records having a bearing on Samuel S. Smith's present and past medical condition."

9. After 6:00 p.m. September 6, 1978, being fully aware of the Order of the Court and the impending appointment for his examination, Respondent notified his Counsel of his refusal to attend the examination, claiming the advice of his family physician as his reason therefor. Respondent's Counsel, while trying to secure Respondent's compliance, notified the Board of Managers immediately.

10. Respondent indeed failed to comply with the Order of the Court and did not submit to examination on September 7, 1978.

11. Respondent's contemptible actions place the Managers and the Court in a totally untenable position. On one hand Respondent claims his health will not permit him to stand trial and, on the other hand, he refuses to permit an independent determination as to his health.

12. The undersigned counsel would respectfully represent that there exist no objective criteria that would indicate the necessity of a Continuance and that all that exist are the reports of Respondent to his physician of subjective symptoms which are not borne out by physical manifestation. Further, Managers submit that there can be no showing that a trial of a man on issues which he has been faced with twice before and who has spent 17 years subject to the tension of the courtroom poses danger to the extent to warrant continuance.

13. Managers assert that the testimony of Respondent's doctor should not be considered alone and that the examination of an independent physician is mandatory.

14. Respondent has, by his refusal to obey the Order of the Court, deprived the Court of the objective criteria necessary on which to make a determination on the Motion for Con-

tinuance. Respondent's actions would indicate that he is attempting to force this Honorable Court to make a determination solely on the information he chooses for it to have. To do so, is to perpetuate a fraud and sham on the Court.

15. It is obvious that a predicate is being laid for a claim in the future that Respondent is unavailable to present himself for the Impeachment Trial so as to leave the Court without any recourse to verify the health-impediment reasons he advances.

WHEREFORE, Managers pray:

a. That Respondent's Motion for Continuance of Trial be striken and no evidence be permitted with respect to it until such time as Respondent complies with the Order of the Court.

b. That Respondent be compelled to comply with the Order for a physical examination so that the impeachment proceedings scheduled to begin on September 13, 1978, not be delayed.

c. That failure on the part of the Respondent to comply not be permitted to be used as a ploy to result in a postponement of the Senate proceedings, and

d. That should Respondent fail to present himself for a physicial examination or the trial proceedings, a plea of not guilty be entered for him and the Senate Sitting as Court of Impeachment proceed to try him In Absentia.

Respectfully submitted,
Marc H. Glick, Counsel to the Board of Managers on the Part of the House of Representatives

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Demand to Strike Respondent's Motion for Continuance of Trial Date has been furnished by U. S. Mail to Honorable Ronald K. Cacciatore, Counsel for Respondent, at Suite 401, The Legal Center, 725 East Kennedy Boulevard, Tampa, Florida 33602, this 7th day of September, 1978.

Marc H. Glick

MANAGER'S REPLY TO RESPONDENT'S MOTION FOR CONTINUANCE OF TRIAL DATE

On August 29, 1978, Respondent Samuel S. Smith filed a Motion for Continuance of Trial Date grounded on reasons of health. The Board of Managers (hereinafter referred to as Managers), pursuant to that Motion, have filed a Demand for Independent Physical Examination of Respondent.

The Managers respectfully submit that all evidence bearing on Respondent's health and ability to prepare and participate in his defense should be heard by the Court of Impeachment when it convenes at 2:00 p.m. on Wednesday, September 13, 1978.

Managers herewith submit that Respondent's Motion for Continuance should be denied as there can be no showing that a trial of a man on issues that he has been faced with twice before, and who has spent 17 years subject to the tensions of the courtroom, poses difficulties to the extent to warrant continuance.

DATED THIS 7th day of September, 1978.

Respectfully submitted,
Marc H. Glick, Counsel to the Board of Managers on the Part of the Florida House of Representatives

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Managers' Reply to Respondent's Motion for Continuance of Trial Date has been furnished by first class mail to Honorable Ronald K. Cacciatore, Counsel for Respondent, at Suite 401, The Legal Center, 725 East Kennedy Boulevard, Tampa, Florida 33602, this 7th day of September, 1978.

Marc H. Glick

MOTION IN LIMINE

COMES NOW the Respondent, SAMUEL S. SMITH, by and through his undersigned attorney, and files this, his Motion in Limine to prohibit the Board of Managers from introducing into evidence at the trial of this cause certain written material which purports to be a transcript of conversations that were electronically recorded with regard to certain conversations between the Respondent, Samuel S. Smith, and one Robert Leonard, which said conversations allegedly occurred in 1976, and for grounds therefor would respectfully show as follows:

1. That this Motion in Limine is directed to the sound discretion of this Honorable Court. The Respondent would respectfully represent that this Court has the inherent authority to hear in advance of trial this Motion in Limine so as to rule in advance of trial as to whether the matters raised in this Motion are admissible at trial.

2. The Respondent has been led to believe because of representations by the Board of Managers that the said Board of Managers of the House of Representatives intends to introduce at the trial of this cause certain written material which purports to be transcripts of conversations which were electronically recorded in 1976 between the Respondent, Samuel S. Smith, and one Robert Leonard.

3. That the undersigned attorney would certify, that he has reason to believe, and that he does believe, that these purported transcripts are in reality written material prepared at the direction of one Robert Leonard so that said transcripts reflect what was allegedly stated in the conversations electronically recorded between the Respondent, Samuel S. Smith, and one Robert Leonard; that said transcripts were prepared by certain Government Agents at the direction of said Robert Leonard, who told and advised said Agents that in his opinion, by listening to certain tape recordings, that said tape recordings reflected what was eventually reduced to writing, and is in effect, the purported transcripts that your Respondent contends are inadmissible at trial; through conversations with counsel that participated in two separate trials, one identified as being Case No. 77-14-Cr-J-7, and one being identified as Case No. 77-270-Cr-J-T, that the purported transcripts were received in evidence to the extent that in one trial the jury was allowed to read said transcripts while listening to the taped conversations mentioned above and in the other trial the jury was allowed to maintain in their possession these purported transcripts during the testimony of several witnesses and said jury was also allowed to have said transcripts with them at the time the jury considered its verdict in the cause, and that further, the undersigned counsel certifies that he has reason to believe, and that he does believe, that said purported transcripts were received in evidence in these federal trials because of the Federal Rules of Evidence.

4. That the Federal Rules of Evidence have no force nor legal effect within the State of Florida.

5. That Respondent contends that under Florida law, said purported transcripts are inadmissible as being in violation of

the best evidence rule since the electronic taped conversations are in fact the best evidence. The Respondent further contends that said purported transcripts are inadmissible because said transcripts would violate the rules against repetition, improper emphasis and hearsay. Further, since these transcripts are in effect the opinion of one Robert Leonard as to what was said in the recorded conversations between Samuel S. Smith and Robert Leonard, said transcripts should not be admissible as being opinion evidence and that further counsel for the Respondent would certify that there is no evidence nor basis to suggest that the said Robert Leonard qualifies as an expert in this area so as to qualify his opinion as being expert testimony. Further, the Respondent contends that in the event the Senate is allowed to view and receive said purported transcripts, the Respondent will be denied his rights under the Sixth Amendment to the Constitution of the United States, a fair trial and due process as guaranteed to the Respondent by both the Constitution of the State of Florida and the Constitution of the United States.

WHEREFORE, the Respondent, Samuel S. Smith, respectfully prays this Honorable Court will, upon hearing this Motion in Limine, grant the Motion and enter an Order prohibiting the Board of Managers from introducing the purported transcripts in evidence at the trial of this cause.

DATED this 29th day of August, 1978.

Ronald K. Cacciatore
Attorney for Respondent

STATE OF FLORIDA
COUNTY OF HILLSBOROUGH

Before me this date personally appeared RONALD K. CACCIATORE, who, after being first duly sworn by me, deposes and says that the matters contained within the foregoing Motion in Limine are true and correct to the best of his knowledge.

Ronald K. Cacciatore

Sworn to and subscribed before me this 29th day of August, 1978.

Pamela Lynn Long
Notary Public, State of Florida at Large

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished to MARC H. GLICK, ESQUIRE, Attorney for Board of Managers of the House of Representatives, 208 House Office Building, Tallahassee, Florida, 32304 by first class mail this 29th day of August, 1978.

Ronald K. Cacciatore
Attorney

LEGAL MEMORANDUM IN SUPPORT OF MOTION IN LIMINE

Counsel for the Respondent respectfully suggests that merely because these purported transcripts were received in evidence in federal trial that there simply is no basis in Florida law for the admissibility of these transcripts in this proceeding.

Apparently, under the liberal Federal Rules of Evidence, Government prosecutors are allowed through the new Federal Rules of Evidence to introduce evidence which in the past would not have been admissible.

Obviously, the Federal Rules of Evidence have no force nor effect, and are not legal precedent within the State of Florida. The Respondent would respectfully suggest that the proposed Florida Rules of Evidence have received such criticism from the Bar of this State that the Legislature has delayed the implementation of those proposed Rules.

The leading case in Florida, and the only case which Respondent has found that is directly on point with the issue raised by the Motion in Limine, is the case of *Duggan v. State*, 189 So. 2d 890 (1st DCA Fla. 1966) in which the District Court of Appeal held that written transcripts prepared by a court reporter of tape recordings of conversations between the defendant and another who allegedly made bribery payments to defendant were inadmissible under the best evidence rule since the tape recordings themselves were best evidence. The Respondent would respectfully submit that *Duggan, supra,* is the law of Florida and that no other Court within this State has modified or overruled the law and authority of that case.

Basically, the Court found three reasons why the transcripts prepared by a court reporter were not admissible and the Court in *Duggan, supra,* stated at page 891:

> "It it our opinion that the written transcripts of the three tape recordings were inadmissible in evidence under several established Rules of Evidence: permitting the transcripts to be furnished to the jury violated the best evidence rule, since the tape recordings themselves were the best evidence; the court reporter who made the transcripts was not present when the recordings were made, and hence his transcripts constituted pure hearsay and were inadmissible under the hearsay rule; and the jury's use of the transcripts violated the rules against undue repetition and improper emphasis."

The Respondent concedes that there is one factual distinction between that case and the facts in the instant cause. Here the transcripts were in effect prepared by one of the parties to the taped recorded conversations, while in *Duggan, supra,* the transcripts were prepared by a court reporter. However, the Respondent would respectfully point out that, even though the transcripts were in effect prepared by one of the parties to the conversation, the transcripts amount to opinion evidence by a person who cannot qualify as an expert in this area.

In any event, the Respondent would respectfully urge that these transcripts would do great violence to the best evidence rule and the rules against undue repetition and improper emphasis.

Other cases in Florida would tend to support the *Duggan* theory, even though these cases deal with matters not specifically on point.

In *Williams v. State,* 185 So. 2d 718 (3d DCA, Fla. 1966) the Court held that it is error to allow in evidence a typewritten transcript of the interrogation of the defendant inasmuch as the defendant was not shown the transcript nor was it read to him or signed by him. In effect, the Court held that an oral statement transcribed by a third party which is not read to or adopted by the defendant is inadmissible in evidence.

The theory of law announced in the preceding case was apparently adopted by the Supreme Court in *Jenkins v. State,* 18 So. 182 (1895) where the Court held that the accused had not signed nor had he approved in any way, certain writings that had been recorded when he testified before a Grand Jury.

In *Marshall v. State,* 339 So. 2d 723 (1st DCA, Fla. 1976), the Court held that the trial court did not commit error in refusing to admit into evidence stenographic reported statement of the defendant which had not been acknowledged by the defendant to be a correct transcript of her alleged statement or confession.

Finally, it would appear that the Second District Court of Appeal has adopted a position similar to the First District as is indicated in the case of *Carrizales v. State*, 345 So.2d 1113 (2d DCA, Fla. 1977).

In conclusion, the Respondent would respectfully suggest to this Honorable Court that there is simply no basis in Florida law for the admissibility of these purported transcripts which the Board of Managers seek to introduce at the trial of this cause.

Respectfully submitted,
Ronald K. Cacciatore
Attorney for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished to MARC H. GLICK, ESQUIRE, Attorney for the Board of Managers of the House of Representatives, 208 House Office Building, Tallahassee, Florida, 32304, by first class mail this 29th day of August, 1978.

Ronald K. Cacciatore
Attorney

MANAGERS' REPLY TO RESPONDENT'S MOTION IN LIMINE

The Respondent has filed a Motion in Limine on August 29, 1978, requesting this Court to prohibit the introduction in evidence of certain transcriptions of electronic sound recordings of conversations between the Respondent and one Robert Leonard. The Board of Managers of the House of Representatives (hereinafter referred to as Managers) do not intend to actually introduce said transcriptions into evidence; however, the Managers do plan to utilize the transcriptions to assist the Senate in understanding the tape recordings from which the transcriptions were prepared in the event that the recordings are offered into evidence. The Managers submit that Florida law as well as Federal law supports the use of transcriptions of sound recordings in this manner as an aid to the jury in understanding the evidence.

Respondent relies heavily upon the case of *Duggan v. State*, 189 So. 2d 890 (Fla. 1st D.C.A. 1966) (hereinafter cited as *Duggan*) despite the fact, which Respondent concedes, that in the present case the transcriptions were in effect prepared by one of the parties to the taped conversation whereas in that case the transcription was prepared by a court stenographer who was not present when the recordings were made and had no personal knowledge of the matters dealt with therein. That distinction is crucial inasmuch as subsequent cases interpreting *Duggan* have indicated that the principal test in the use of transcriptions of tape recordings in a trial is whether or not there has been proper authentication to insure their accuracy by a person who was present when the recording was made.

This key element was missing in the *Duggan* case which involved the transcription of a tape recording which had been prepared by a court reporter who was not present when the recording was made and had no personal knowledge of the matters therein. Furthermore, the reporter testified that one of the recordings contained inaudible remarks and that there were variations between the transcriptions being offered into evidence at that trial and earlier transcriptions which the same reporter had prepared from the very same tape recordings. Despite this questionable authentication, the trial court not only admitted the transcriptions into evidence but permitted the jury to take the transcriptions to the jury room.

Subsequent cases interpreting *Duggan* have restricted the case to its specific facts and make it clear that transcriptions of tape recordings can be utilized as an aid in understanding to the jury provided that they are properly authenticated, that they are not actually admitted into evidence, and that they are not permitted into the jury room. In *Grimes v. State*, 244 So. 2d 130 (Fla. 1971), defendant/appellant contended that the trial court had erred in allowing the transcription of a tape recording to be published to the jury on the grounds that the transcription was not the best evidence under the authority of the *Duggan* case. The Florida Supreme Court observed that the *Duggan* case involved a transcription prepared by a person absent when the recording was made, the transcriptions were actually admitted into evidence, and the jurors were permitted to take copies to the jury room. The Supreme Court found none of these factors present in the *Grimes* case and upheld the use of the transcription since there had been proper authentication:

> "In the case *sub judice*, the transcript of the tape recording was not admitted in evidence, but the trial court allowed the transcript to be read after Officer William Campbell testified that he had checked the recording itself and that the transcript was an accurate copy of the recording. Mr. Campbell was present when the recorded statement was taken and, in fact, took the recorded statement. In other words, the transcription was properly authenticated by the person who took the statement and who verified that the transcript was the same evidence as the recording." *Id.* at 135.

The rule established in *Grimes* was reaffirmed this year by the First District Court of Appeal in the *Waddy v. State*, 355 So. 2d 477 (Fla. 1st D.C.A. 1978) which involved a transcription of a tape recording by an unidentified stenographer. Although the Court held there was a lack of proper authentication in this particular case, the Court made it clear that the transcriptions could have been utilized had there been proper authentication:

> "The court erred in allowing the transcription of Waddy's tape recorded statement into evidence and in permitting the jury to take it into the jury room during its deliberations. The best evidence was the tape recording. *Duggan v. State*, 189 So. 2d 890 (Fla. 1st DCA 1966). *If the transcript had been properly authenticated, which it was not, it could have been read to the jury. Grimes v. State*, 244 So. 2d 130 (Fla. 1971). But even then, it should not have been admitted into evidence nor should the jury have been permitted to take it into the jury room for use during its deliberations. *Grimes*, supra." Id. at 478. (e.s.)

Respondent suggests that the dicta in *Carrizales v. State*, 345 So. 2d 1113 (Fla. 2nd DCA 1977), supports his position. On the contrary, once it is recognized that the crucial issue is proper authentication by a person present when the recording was made, Managers submit that the dicta clearly reflects that transcriptions of tape recordings can be used upon proper authentication under the *Grimes* rule:

> "Appellant raised a further point concerning a typewritten transcript of a tape-recorded statement taken from him by a deputy sheriff and read at trial. The thrust of appellant's argument is that his statement was not properly authenticated since no one present when the statement was taken testified that the transcript accurately reflected the actual interview between the deputy and the appellant. In view of our opinion requiring a new trial because of the court's failure to give the requested instruction, we do not reach this contention. *We are confident, however, that on retrial the court will make certain that the transcript of appellant's tape-recorded*

statement is properly authenticated before admitting it into evidence." Id. at 1115-6. (e.s.)

The Managers do not quarrel with the proposition of law stated by Respondent that transcriptions of stenographers' notes are inadmissible unless acknowledged or adopted by the defendant under the authority of *Williams v. State*, 185 So. 2d 718 (Fla. 3rd DCA 1966), *Jenkins v. State*, 18 So. 182 (Fla. 1895), and *Marshall v. State*, 339 So. 2d 723 (Fla. 1st DCA 1976). However, these cases and the legal proposition cited therefrom are simply not applicable here since those cases all deal with transcriptions of stenographers' notes, not with transcriptions of tape recordings as in the case here. Indeed, the *Grimes*, *Waddy*, and *Carrizales* decisions, *supra.*, all indicate that the transcriptions of tape recordings can be utilized under certain conditions even though the defendant has not acknowledged or adopted them.

Furthermore, the transcriptions in question in the present proceeding were utilized in the earlier federal trial of Respondent. During that trial, Respondent was given full discovery to both the tape recordings and the transcriptions as well as the opportunity to submit his version of what transpired on the tape recording where it differed from the version submitted by the authenticating witness for the prosecution. Where there were different versions (and it should be noted such differences are minor), the transcriptions clearly reflect both versions.

As Respondent has acknowedged, the practice of permitting the jury to utilize transcriptions not admitted into evidence to assist them in understanding tape recordings is well known in federal courts:

> "The procedure employed by the district court of permitting the jury to utilize transcripts not admitted into evidence in order to assist them in understanding tape-recorded conversations is well known and has been consistently approved." *United States v. Dorn*, 561 F. 2d 1252, 1257 (7th Cir. 1977).

Respondent attempts to suggest that this is the result of the new "liberal" Federal Rules of Evidence and that such use in the past was not permitted. However, the use of transcriptions of tape recordings in federal criminal trials has been consistently approved by federal courts from as early as 1963. *See, e.g., Gonzales v. United States*, 314 F 2d 750 (9th Cir. 1963); *Lindsey v. United States*, 332 F 2d 688 9th Cir. 1964); *Fountain v. United States*, 384 F 2d 624 (5th Cir. 1967); *United States v. Koska*, 443 F 2d 1167 (2nd Cir. 1971); *United States v. Carson*, 464 F 2d 424 (2nd Cir. 1972); *United States v. Bryant*, 480 F 2d 785 (2nd Cir. 1973); *United States v. Marrapese*, 486 F 2d 918 (2nd Cir. 1973). Furthermore, the use of transcriptions of tape recordings has been upheld in other state jurisdictions from as early as 1953. *See, e.g., People v. Albert*, 6 Cal. Rptr. 473 (Cal. Ct. App. 1960); *People v. Davis*, 26 Cal. Rptr. 903 (Cal. Ct. App. 1962); *People v. Ketchel*, 381 P. 2d 394 (Cal. Sup. Ct. 1963); *People v. Morse*, 388 P. 2d 33 (Cal. Sup. Ct. 1964); *Kilpatrick v. Kilpatrick*, 193 A. 765 (Conn. Sup. Ct. 1937); *State v. Melerine*, 109 So. 2d 454 (La. Sup. Ct. 1959); *State v. Snedecor*, 294 S. 2d 207 (La. Sup. Ct. 1974); *People v. Feld*, 113 NE 2d 440 (N. Y. Ct. App. 1953); *People v. Gucciardo*, 355 NYS 2d 300 (N. Y. Sup. Ct. 1974), and *State v. Fox*, 175 SE 2d 561 (N. C. Sup. Ct. 1970).

The reason behind permitting the use of such transcriptions is not the result of some new exception in the Federal Rules of Evidence to the best evidence rule and the rules against hearsay, opinion evidence, and undue emphasis and repetition, but rather for the simple reason so aptly stated in 1953 by the New York Court of Appeals:

> ". . . the appellant objected to the receipt of such transcripts in evidence, not as to accuracy, but on the ground that the subject matter was secondary evidence, repetitious and prejudicial. There is nothing to the error so assigned. The recordings were the best evidence of the conversation, the transcript added nothing. *To allow the court and jurors to hold in their hands a transcript as they listened to the playback of the records was no different than allowing them to have, in an appropriate case, a photograph, a drawing, a map or a mechanical model, any of which have been recognized as an assistance to understanding." People v. Feld*, 113 NE 2d 440 (N. Y. Ct. App. 1953). (e.s.)

Furthermore, "the use of transcripts contemporaneously with the playing of sound recordings often eliminates the necessity of replaying the recordings many times, an alternative far more likely to emphasize their contents." *United States v. Turner*, 528 F 2d 143, 168 (9th Cir. 1975).

In conclusion, Managers respectfully submit that both federal cases and Florida cases are clear that transcriptions of tape recordings can be utilized by the jury as an aid to understanding the tape recordings provided there is proper authentication by a person present when the recording was made. Managers believe that such authentication can be made at the impeachment trial.

Respondent's Motion in Limine requests this Honorable Court to prohibit the introduction of the transcriptions into evidence. If this is the sole concern of Respondent, then Managers do not object for there is no intention to actually introduce the transcriptions into evidence but merely to use them as an aid to the Senate in understanding the tape recordings in the event that the recordings are offered into evidence. If, however, Respondent means to imply that the transcriptions cannot be used at all in the trial, Managers respectfully pray this Honorable Court deny the Motion to Limine.

Respectfully submitted,
Marc H. Glick, Counsel to the Board of Managers on the Part of the Florida House of Representatives

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Managers' Reply to Respondent's Motion in Limine has been furnished by first class mail to Honorable Ronald K. Cacciatore, Counsel for Respondent, at Suite 401, The Legal Center, 725 East Kennedy Boulevard, Tampa, Florida 33602, this 7th day of September, 1978.

Marc H. Glick

MOTION TO COMPEL AND REQUEST FOR PRETRIAL HEARING

COMES NOW the Respondent, SAMUEL S. SMITH, by and through his undersigned attorney and files this his Motion to Compel and Request for Pretrial Hearing, and respectfully submits that in order for the Respondent to properly prepare a defense to the Articles Of Impeachment, and in particular, Article II of the Articles Of Impeachment, the Board of Managers should be compelled by this Honorable Court to produce by separate pleading the names of those persons that the Board of Managers intends to show at the trial of this cause participated with the Respondent in the alleged conspiracy set forth in Article II of the Articles Of Impeachment and that further, the Respondent respectfully requests this Honorable Court to conduct a pretrial hearing to determine whether in fact there is a conspiracy as alleged, the names of the persons that participated in the alleged conspiracy, and whether under the "co-conspirator rule" the acts and declarations of other alleged members of the alleged conspiracy will be admissible at the

trial of this cause and will be received as evidence against the Respondent, and for grounds therefor would respectfully show as follows:

1. That Article II of the Articles Of Impeachment alleges that the Respondent was engaged in a conspiracy, but said Article II fails to advise the Respondent with whom it is he has alleged to have conspired.

2. That the Board of Managers has advised counsel for the Respondent that the said Board of Managers intends to introduce at the trial of this cause statements and declarations of other alleged members of the alleged conspiracy under the "co-conspirator rule".

3. The Respondent recognizes that the law in Florida is that every act and declaration of each member of a conspiracy is the act and declaration of them all and is therefore original evidence against each of them. *Honchell v. State,* 257 So.2d 889 (Fla. 1972) and *Damon v. State,* 289 So.2d 720 (1974). However, the Respondent respectfully urges this Honorable Court that he will be denied a fair trial and due process unless he is advised prior to the trial of this cause on its merits the names of those persons with whom he is alleged to have conspired, and further, the names of those persons whom the Board of Managers will contend at the trial of this cause were co-conspirators in the alleged conspiracy whose statements and declarations will be admissible at the trial of this cause against the Respondent under the "co-conspirator rule".

4. The Respondent respectfully suggests that before the "co-conspirator rule" may be invoked, there must first be independent evidence of the existence of the conspiracy and of the Respondent's participation in the alleged conspiracy. *Honchell v. State,* 257 So.2d 889 (Fla. 1972), *Damon v. State,* 289 So.2d 720 (1974) and *Adarim v. State,* 350 So.2d 1082 (3d DCA, Fla. 1977).

5. The Respondent respectfully suggests that there will be a failure of justice and that he will be denied due process unless this Honorable Court determines that there should be a pretrial hearing on the issue of the existence of a conspiracy, the determination and the identification of names of the alleged co-conspirators that allegedly participated in the alleged conspiracy with the Respondent, and whether the acts and declarations of those alleged members of the alleged conspiracy will be admissible against the Respondent under the "co-conspirator rule".

6. The Respondent Samuel S. Smith would further suggest that such a procedure is not only justified but required in these circumstances to prevent a failure of justice since normal appellate remedies are not available to the Respondent should he be found guilty of one or more of the Articles Of Impeachment by The Senate.

WHEREFORE, the Respondent Samuel S. Smith respectfully prays that this Honorable Court will hold a pretrial hearing for the purposes requested in this Motion and that further this Honorable Court will compel the Board of Managers to produce by separate pleading the names of those persons that the Board of Managers will contend at the trial of this cause participated in the alleged conspiracy with the Respondent.

DATED this 30th day of August, 1978.

Ronald K. Cacciatore
Attorney for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished to MARC H. GLICK, ESQUIRE, Attorney for the Board of Managers of the House of Representatives, 208 House Office Building, Tallahassee, Florida, 32304, by first class mail this 30th day of August, 1978.

Ronald K. Cacciatore
Attorney

REPLY TO RESPONDENT'S MOTION TO COMPEL AND REQUEST FOR PRETRIAL HEARING

Respondent filed on August 30, 1978, a Motion to Compel and Request for Pretrial Hearing, requesting this Honorable Court to order production by separate pleading of certain information and to hold a pretrial hearing on certain matters relating to the "co-conspirator rule."

Respondent argues that he will be denied justice unless the Board of Managers for the House of Representatives (hereinafter referred to as Managers) produce by separate pleading the names of those persons who Managers contend participated in a conspiracy with Respondent. Managers are somewhat taken aback by the glibness with which Respondent asserts that Article II does not advise Respondent with whom he is alleged to have conspired. Article II sets forth in particular 20 separate acts by Respondent in furtherance of a conspiracy as well as the names of those with whom he acted in concert.

Nor do Managers see any need for a pretrial hearing to determine whether in fact there is a conspiracy, the identification of the co-conspirators, and whether the acts and declarations of the co-conspirators will be admissible under the co-conspirator rule. To admit co-conspirator statements into evidence, the existence of a conspiracy need only be established on a prima facie basis and there need only be "slight evidence" linking the defendant with the conspiracy. *United States v. Archbold-Newball,* 554 F.2d 665 (5th Cir. 1977); *United States v. Prieto,* 505 F.2d 8 (5th Cir. 1974); *Parker v. State,* 276 So.2d 98 (Fla. 4th D.C.A. 1973); *Hudson v. State,* 276 So.2d 89 (Fla. 4th D.C.A. 1973). Respondent has previously been convicted of wilfully and knowingly combining, conspiring, confederating and agreeing with others, to commit an offense against the United States, that is, to distribute and cause to be distributed marijuana. *See* Exhibit C, Uniform Exhibits Before the Court of Impeachment, Volume 1. Can there be better evidence of Respondent's participation in a conspiracy than a finding of guilt of such conduct by a court of competent jurisdiction?

Managers respectfully submit that such evidence of Respondent's participation in a conspiracy is more than "slight"; it is overwhelming. Especially in light of such evidence, there is simply no need at all to hold a pretrial hearing to determine the existence of a conspiracy in order to determine the admissibility of co-conspirator statements. *United States v. Bynum,* 566 F.2d 914 (5th Cir. 1978). In fact, even during the trial itself, co-conspirator statements may be admitted into evidence before proof of the conspiracy has been furnished on the condition that the prosecution subsequently do so. *Everett v. State,* 339 So.2d 704 (Fla. 3rd D.C.A. 1976), *Honcell v. State,* 257 So.2d 889 (Fla. 1971). It is not even necessary that a conspiracy be charged before the declarations of co-conspirators are admitted under the co-conspirators rule. *Hernandez v. State,* 323 So.2d 318 (Fla. 3rd D.C.A. 1975); *Damon v. State,* 289 So.2d 720 (Fla. 1973); *Honcell v. State, supra.*

In conclusion, Managers submit that Article II is sufficiently definite to apprise Respondent with whom he is charged of conspiring and that the evidence already before the Court in Uniform Exhibits stipulated to by Respondent is more than adequate to meet the standards necessary for admissibility of co-conspirator statements. If need be, Managers would be happy

to provide this Honorable Court with copies of the entire transcripts of Respondent's earlier federal trial in which he was found guilty of conspiracy in order to establish the existence of "slight evidence" that Respondent participated in a conspiracy.

WHEREFORE, Managers pray this Honorable Court deny the Motion to Compel and Request for Pretrial Hearing.

Dated this 7th day of September, 1978.

Respectfully submitted,
Marc H. Glick, Counsel to the Board of Managers on the Part of the Florida House of Representatives

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply to Respondent's Motion to Compel and Request for Pretrial Hearing has been furnished to Honorable Ronald K. Cacciatore, Counsel for Respondent Samuel S. Smith, Suite 401, The Legal Center, 725 East Kennedy Boulevard, Tampa, Florida 33602, by first class mail this 7th day of September, 1978.

Marc H. Glick

DEMAND FOR INDEPENDENT PHYSICAL EXAMINATION OF RESPONDENT

COMES NOW the Board of Managers on the Part of the Florida House of Representatives (hereinafter referred to as Managers), by and through their undersigned counsel, pursuant to Rule 29 of the Rules of Practice and Procedure of the Florida Senate sitting as a Court of Impeachment, Rule 1.360 (a) of the Rules of Court Procedure and Rule 3.220(b)(1)(ix) of the Florida Rules of Criminal Procedure, and files this Demand for Independnt Physical Examination of Respondent, and as grounds therefor would respectfully show the Court as follows:

1. Respondent has filed a Motion for Continuance of Trial Date stating that his health is such that he is unable to stand trial before the Senate or help prepare and participate in his defense.

2. Respondent has offered the Affidavit and taken Depositions of doctors who have undertaken to examine Respondent at his own motion.

3. The Managers respectfully suggest that for the purpose of this adversary proceeding that the testimony of the Respondent's doctors should not be considered alone and that the examination of an independent doctor is called for.

4. The undersigned Counsel would further represent that there exists no objective criteria that would indicate the necessity of a Continuance and all that exists are the reports of Respondent to his physician of subjective symptoms which are not borne out by physical manifestation.

5. The Managers will provide at their expense a Board Certified Cardiologist in Tallahassee, Florida, to examine Respondent so that the results of said independent examination can be brought before the Senate at the time Respondent's Motion for Continuance is heard.

WHEREFORE, the Managers respectfully pray this Honorable Court will enter an Order directing Respondent Samuel S. Smith to submit to examination by John L. Wilson, M.D., a Board Certified Cardiologist, located at 1308 Hodges Drive, Tallahassee, Florida, on Thursday, September 7, 1978 at 10:00 a.m. so that the results will be available to this Honorable Court in time for it to make a determination on Respondent's Motion for Continuance. Further, the Managers request Respondent be directed to provide Dr. Wilson all medical records he can obtain which have bearing on his condition.

DATED this 5th day of September, 1978.

Respectfully submitted,
Marc H. Glick, Counsel to the Board of Managers on the Part of the Florida House of Representatives

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Demand for Independent Physical Examination of Respondent has been read to Ronald K. Cacciatore, Counsel for Respondent, by telephone this 5th day of September, 1978, and that a true and correct copy has been furnished to him by first class U.S. mail at Suite 401, The Legal Center, 725 East Kennedy Boulevard, Tampa, Florida 33602, this 5th day of September, 1978.

Marc H. Glick

ORDER FOR INDEPENDENT PHYSICAL EXAMINATION OF RESPONDENT

As a consequence of respondent Samuel S. Smith's Motion for Continuance filed on August 29, 1978, respondent's present physical condition has been made a subject of critical controversy in this proceeding. The Board of Managers on the Part of the Florida House of Repreesntatives has now filed a Demand for Independent Physical Examination of Respondent, pursuant to Rule 1.360(a) of the Florida Rules of Civil Procedure and Rule 3.220(b)(1)(ix) of the Florida Rules of Criminal Procedure. Respondent objects to the Board of Managers' demand.

Full consideration of respondent's condition requires that a physician designated by the Board of Managers be permitted to examine respondent for the purpose of gathering evidence relative to respondent's motion for a continuance. Accordingly, it is

ORDERED that Samuel S. Smith shall submit to an examination by John L. Wilson, M.D., Cardiologist, at 1308 Hodges Drive, Tallahassee, Florida, on Thursday, September 7, 1978, at 10:00 a.m., and that respondent shall provide Dr. Wilson with all relevant medical records having a bearing on Samuel S. Smith's present and past medical condition.

Dated: September 6, 1978.

Arthur J. England, Jr.
Chief Justice
Supreme Court of Florida
Presiding Officer

MOTION FOR ORDER TO SHOW CAUSE WHY RESPONDENT SHOULD NOT BE HELD IN CONTEMPT

COMES NOW the Board of Managers on the Part of the Florida House of Representatives, by and through their undersigned counsel, pursuant to Rule 29 of the Rules of Practice and Procedure of the Florida Senate Sitting as Court of Impeachment, Rule 1.380(b)(2), (d), of the Florida Rules of Civil Procedure, and Rule 3.220(b)(1)(ix) of the Florida Rules of Criminal Procedure, and files this Motion for an Order to Show Cause Why Respondent Should Not Be Held in Contempt, and as grounds therefor, would respectfully show the Court as follows:

1. Managers on the 5th day of September 1978, applied to the Honorable Arthur J. England, Jr., Presiding Officer of the Senate Sitting as Court of Impeachment, for an Order setting up an independent physical examination of the Respondent.

2. By Order dated September 6, 1978, Florida Supreme Court Chief Justice Arthur J. England, Jr., Presiding Officer of the Florida Senate Sitting as Court of Impeachment, issued an Order stating "it is

"ORDERED that Samuel S. Smith shall submit to an examination by John L. Wilson, M.D., Cardiologist, at 1308 Hodges Drive, Tallahassee, Florida, on Thursday, September 7, 1978, at 10:00 a.m., and that respondent shall provide Dr. Wilson with all relevant medical records having a bearing on Samuel S. Smith's present and past medical condition."

3. On the evening of September 6, 1978, Counsel for Respondent, advised your Movant that the Respondent would not submit to the examination as ordered.

4. Managers have checked with Dr. John L. Wilson at 10:30 a.m., September 7, 1978, and were advised that Respondent indeed failed to appear as ordered.

WHEREFORE, the Managers respectfully pray an Order to Show Cause Why Respondent Should Not Be Held In Contempt be issued for Respondent's failure to obey the Order of the Court.

Respectfully submitted,
Marc H. Glick, Counsel to the Board of Managers on the Part of the Florida House of Representatives

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion to Show Cause Why Respondent Should Not Be Held in Contempt has been furnished by U.S. Mail to Honorable Ronald K. Cacciatore, Counsel for Respondent, at Suite 401, The Legal Center, 725 East Kennedy Boulevard, Tampa, Florida 33602, this 7th day of September, 1978.

Marc H. Glick

ORDER TO COMPLY OR SHOW CAUSE

Pursuant to respondent Samuel S. Smith's motion to continue this proceeding past the scheduled trial date of September 13, 1978, on the basis of an asserted impairment in his physical condition, the Board of Managers on the Part of the House of Representatives moved the Presiding Officer to compel respondent to submit to a physical examination by a physician of its choosing and to provide relevant medical records. On September 6, 1978, the Presiding Officer entered an order approving the Board of Managers' requests, pursuant to Rule 1.360(a) of the Florida Rules of Civil Procedure, Rule 3.220(b)(1)(ix) of the Florida Rules of Criminal Procedure, and Rule 29 of the Florida Senate Rules of Practice and Procedure When Sitting on the Trial of Impeachments. The Board of Managers has now formally notified the Presiding Officer that respondent has failed to comply with the September 6 order and requests an order to show cause why respondent should not be held in contempt. Respondent has not provided the Presiding Officer with an explanation for his failure to submit to an examination or to comply with the September 6 order.

Pursuant to Rule 1.380(b)(2)(A) and (C) of the Florida Rules of Civil Procedure, Rule 3.220(j)(1) of the Florida Rules of Criminal Procedure, and Rule 29 of the Senate Rules of Practice and Procedure When Sitting on the Trial of Impeachments, it is

ORDERED,

(1) That respondent submit to a physical examination by John L. Wilson, M.D., Cardiologist, or by any other physician approved by the Board of Managers, and provide relevant medical records as described in the Presiding Officer's September 6 order, not later than 12:01 p.m., Monday, September 11, 1978; or

(2) That respondent's counsel, his personal physician or physicians, and, if physically able, respondent himself, personally appear before the Presiding Officer, with all relevant medical records, at 1:00 p.m. on Monday, September 11, 1978, in Room G of the Senate Office Building in Tallahassee, Florida, to show cause why respondent's request for a continuance should not be denied for failure to submit to an independent physical examination by a physician approved by the Board of Managers, or to otherwise respond to the Presiding Officer's September 6 order; why respondent's impeachment trial should not proceed as scheduled on September 13, 1978, without respondent being physically present; or why other appropriate sanctions should not be imposed on respondent for failure to comply with the Presiding Officer's September 6 order.

It is so ordered, September 8, 1978.

Arthur J. England, Jr.
Chief Justice
Supreme Court of Florida
Tallahassee, Florida
Presiding Officer

WRITTEN PLEA OF NOT GUILTY

COMES NOW SAMUEL S. SMITH, by and through his undersigned attorney, pursuant to Rule 29 of the Rules of Practice and Procedure when sitting on the Trial Of Impeachments as adopted by The Florida Senate, and Rule 3.160(a) of the Florida Rules of Criminal Procedure, and hereby files this, his Written Plea of Not Guilty and specifically enters a plea of not guilty to the Articles Of Impeachment, and to each separate Article contained therein, as adopted by House Resolution Number 1560 which was adopted on April 12, 1978.

DATED this 6th day of September, 1978.

Ronald K. Cacciatore
Attorney for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished to MARC H. GLICK, ESQUIRE, Attorney for the Board of Managers of the House of Representatives, 208 House Office Bldg., Tallahassee, Florida, 32304, this 6th day of September, 1978, by first class mail.

Ronald K. Cacciatore
Attorney

MOTION TO DISMISS ARTICLE I OF THE ARTICLES OF IMPEACHMENT

COMES NOW the Respondent, SAMUEL S. SMITH, by and through his undersigned attorney, pursuant to Rule 29 of the Rules of Practice and Procedure when sitting on the Trial of Impeachments as adopted by The Florida Senate, and Rule 3.190(b) of the Florida Rules of Criminal Procedure and files

this, his Motion to Dismiss Article I of the Articles Of Impeachment, which said Articles were adopted by resolution of the House of Representatives on April 12, 1978 and for grounds therefor would respectfully show unto the Court as follows:

1. That Article I purports to allege that the Respondent was convicted of a felony on April 29, 1977 in the case of *UNITED STATES OF AMERICA v. SAMUEL S. SMITH, et al,* United States District Court, Middle District of Florida, Jacksonville Division in Case Nos. 77-14-Cr-J-R and 77-14(S)-Cr-J-R. That the Respondent, Samuel S. Smith, respectfully submits that, as a matter of law, that he has not been convicted of a felony under Florida law inasmuch as the Respondent's direct appeal is now still pending.

2. That the Respondent Samuel S. Smith would respectfully submit that it is not anticipated that there will have been an appellate ruling on the Respondent's direct appeal by September 13, 1978, the time that this matter is scheduled for trial on the merits of the cause.

3. That previously a Motion to Dismiss was filed in this cause, and that attached hereto and made a part hereof by reference is a copy of said Motion; in said Motion, the Respondent contended that he was removed from office upon his conviction for federal offenses which constituted a felony; on May 26, 1978, the Senate, sitting as a Court of Impeachment, denied the Motion to Dismiss and sustained the position of the Board of Managers of the House of Representatives on the issue of whether or not Samuel S. Smith had previously been convicted of a felony. In the Managers' Reply Brief To Respondent's Motion To Dismiss, counsel for the Board of Managers of the House of Representatives took the position and argued that the Respondent had not been previously convicted of a felony and the Board of Managers, on May 26, 1978, orally argued, and took the position, that the Respondent Samuel S. Smith had not previously been convicted of a felony.

4. That the Respondent, Samuel S. Smith, has not been convicted of a felony as that term has been defined under Florida law in that federal case specifically identified previously in this Motion to Dismiss.

WHEREFORE, Samuel S. Smith respectfully prays this Honorable Court will grant this Motion and dismiss Article I of the Articles Of Impeachment.

Ronald K. Cacciatore
Attorney for Respondent

STATE OF FLORIDA
COUNTY OF HILLSBOROUGH

Before me, the undersigned authority, personally appeared RONALD K. CACCIATORE, who, after being duly sworn, deposes and says that the matters contained within the foregoing are true and correct to the best of his knowledge.

Ronald K. Cacciatore

Sworn to and subscribed before me this 29th day of August, 1978.

Pamela Lynn Long
Notary Public, State of Florida at Large

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished to MARC H. GLICK, ESQUIRE, Attorney for the Board of Managers of the House of Representatives, 208 House Office Building, Tallahassee, Florida, 32304, by first class mail this 29th day of August, 1978.

Ronald K. Cacciatore
Attorney

LEGAL MEMORANDUM IN SUPPORT OF MOTION TO DISMISS ARTICLE I OF THE ARTICLES OF IMPEACHMENT

The Respondent Samuel S. Smith previously filed a Motion to Dismiss which was heard by the Senate, sitting as a Court of Impeachment, and which said Motion was denied by the Senate. One of the grounds alleged in the Motion to Dismiss was that the Respondent was removed from office upon his conviction for federal offenses which constituted felonies and that, therefore, the Respondent was no longer an officer subject to impeachment.

In arguments before the Senate on May 26, 1978, the Board of Managers argued successfully that the Respondent was not convicted, within the meaning of that term under Florida law, since a direct appeal was pending at the time of the oral argument in the Senate. In the Managers' Reply Brief, the Board of Managers took the same position and contended that the Respondent had not been "convicted" and further Respondent would not be "convicted" until the matter of his direct appeal had been disposed of by the Fifth Circuit Court of Appeals.

The Respondent respectfully contends that the Board of Managers should not be allowed to take inconsistent positions on this matter. If the Respondent is convicted, he is convicted for all purposes. If the Respondent is not convicted, he is not convicted for all purposes.

In the case of *In re Advisory Opinions of the Governor,* 78 So. 673 (1918) the Court held that a conviction is not operative while a supersedeas is effective.

There are other cases which have been decided in Florida which hold that the use of the word "conviction" in statutes refers to convictions after appeal. The Managers' Reply Brief contains a complete listing of those legal authorities.

In fact, as part of his authority for the proposition that Article I should be dismissed for the grounds set forth, the Respondent would adopt that portion of the Managers' Reply Brief in which it was well argued and well reasoned that the Respondent was not convicted within the meaning of the law.

In conclusion, the Respondent would respectfully submit that the Board of Managers of the House of Representatives should not be allowed to take inconsistent positions on the question of whether the Respondent was "convicted." If the Respondent was truly convicted within the meaning of the law, then Impeachment does not properly lie. If the Respondent was not convicted, then certainly Article I should be dismissed for that reason.

Respectfully submitted,
Ronald K. Cacciatore
Attorney for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to MARC H. GLICK, ESQUIRE, Attorney for the Board of Managers of the House of Representatives, 208 House Office Building, Tallahassee, Florida, 32304, by first class mail this 29th day of August, 1978.

Ronald K. Cacciatore
Attorney

MANAGERS' REPLY TO RESPONDENT'S MOTION TO DISMISS ARTICLE I OF THE ARTICLES OF IMPEACHMENT

Respondent was convicted of a felony in the case of the *United States of America v. Samuel S. Smith, et al,* United States District Court, Middle District of Florida, Jacksonville Division, Case No. 77-14-Cr-J-R and 77-14(S)-Cr-J-R. His conviction is on direct appeal in the United States Court of Appeals for the Fifth Circuit, Case Number 77-5387.

Respondent has argued by previous motion that his conviction operated to remove him from office under Article X, Section 10 of the Constitution of Florida, and thereby deprived the Court of Impeachment (hereinafter referred to as Senate) of jurisdiction. The Senate determined; in that Respondent's felony conviction was on direct appeal, the conviction did not invoke the constitutional provision which would create a vacancy in office.

The Board of Managers on the Part of Florida House of Representatives (hereinafter referred to as Managers) stand fast in their contention that the direct appeal of Respondent's conviction forestall his removal from office.

Respondent now argues that since his appealed conviction forestalls his removal from office, the Senate must dismiss Impeachment Article I which charges him with conviction of felony as a misdemeanor in office warranting his removal and disqualification from office.

In this country every man is presumed innocent until proven guilty. Upon conviction, regardless of appeal, this presumption of innocence is lost, *Nelson v. State,* 208 So. 2d 506, 4th D.C.A. Fla. (1968); *Gonzalez v. State,* 97 So. 2d 127, 2nd D.C.A. Fla. (1957), and *Vaccaro v. State,* 11 So. 2d 186 (1043) (Fla. Sup. Ct. En Banc). The legal disposition of Respondent's conviction is stayed by his appeal, however, having been found guilty, the presumption of innocence has departed the respondent and that which remains is the verdict of guilty.

It is the judgment of respondent's guilt by a jury of his peers which constitutes the misdemeanor in office alleged against him. The judgment strips him of his innocence and lays open his misdemeanor in office separate and apart from the workings of Article X, Section 10 of the Constitution which is frustrated by a direct appeal. Respondent's guilt remains unabated and constitutes misdemeanor in office.

In conclusion, Article I of the Articles of Impeachment alleges misdemeanor in office consistent with the Senate's jurisdictional determination that Respondent's conviction has not yet created a vacancy in office.

WHEREFORE Managers pray that the Motion to Dismiss Article I be denied.

Respectfully submitted,
Marc H. Glick, Counsel to the Board of Managers on the Part of the Florida House of Representatives

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Managers' Reply to Respondent's Motion to Dismiss Article I of the Articles of Impeachment has been furnished by U.S. mail to Honorable Ronald K. Cacciatore, Counsel for Respondent, at Suite 401, The Legal Center, 725 East Kennedy Boulevard, Tampa, Florida 33602, this 7th day of September, 1978.

Marc H. Glick

MOTION TO DISMISS ARTICLE II OF THE ARTICLES OF IMPEACHMENT

COMES NOW the Respondent, SAMUEL S. SMITH, by and through his undersigned attorney, pursuant to Rule 29 of the Rules of Practice and Procedure when sitting on the Trial of Impeachments as adopted by the Florida Senate, and Rule 3.190(b) of the Florida Rules of Criminal Procedure and files this, his Motion to Dismiss Article II of the Articles Of Impeachment, which said Articles were adopted by resolution of the House of Representatives on April 12, 1978 and for grounds therefor would respectfully show unto the Court as follows:

1. That Article II purports to allege that the Respondent has committed a criminal offense, to wit: conspiracy in violation of Section 777.04(3) of the Florida Statutes; further, Respondent would respectfully show that Article II is captioned as follows: "CONSPIRACY TO UNLAWFULLY OBTAIN AND DISTRIBUTE IN EXCESS OF APPROXIMATELY 1500 POUNDS OF MARIJUANA".

2. That Article II is so vague, indistinct and indefinite as to mislead the Respondent and embarrass him in the preparation of his defense or expose him after conviction or acquittal to substantial danger of another impeachment proceeding for the same offense.

3. That the Respondent respectfully alleges that said Article II is vague, indistinct and indefinite in the following manner:

(a) that the language of Article II wholly fails to track in any manner the statutory language of Section 777.04(3) of the Florida Statutes:

(b) that Article II fails to allege with whom the Respondent is supposed to have conspired with to commit a criminal offense;

(c) that Article II fails to allege any times or dates so that the Respondent is not advised as to when he is alleged to have entered into a conspiracy, nor is he advised as to when the conspiracy allegedly ended;

(d) that the words "did set into motion and actively participate in a conspiracy", which said language is contained within Article II, does not charge this Respondent with a violation of any of the laws of Florida, nor does it charge him with committing a criminal conspiracy;

(e) Article II does not contain a statement of the facts relied on as constituting an offense in ordinary and concise language in such a manner as to enable a person of common understanding to know what is intended;

(f) the language contained within Article II is legally insufficient and does not allege that the Respondent committed the offense of criminal conspiracy.

WHEREFORE, the Respondent, Samuel S. Smith, respectfully prays this Honorable Court will grant this Motion to Dismiss Article II of the Articles Of Impeachment presently pending against the Respondent.

DATED this 29th day of August, 1978.

Ronald K. Cacciatore
Attorney for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished to MARC H. GLICK, ESQUIRE, Attorney for the Board of Managers of the House of Representatives,

208 House Office Building, Tallahassee, Florida, 32304, by first class mail this 29th day of August, 1978.

Ronald K. Cacciatore
Attorney

LEGAL MEMORANDUM IN SUPPORT OF MOTION TO DISMISS ARTICLE II

The Respondent respectfully submits that the language contained within Article II of the Articles Of Impeachment is so vague, indistinct and indefinite as to mislead the Respondent and embarrass him in the preparation of his defense.

The House of Representatives has elected to use as a basis for Article II a violation of the criminal law. The language contained within said Article fails totally to track the language of Section 77.04(3) of the Florida Statutes, and further the language contained within Article II fails to charge the Respondent with any conspiracy violation that would be cognizable under federal law.

The allegations contained within Article II fail to set forth any allegations that would constitute the elements of a criminal conspiracy recognized either by Florida law or by federal law.

The Supreme Court of Florida set forth the standard that must be followed in charging one with the offense of conspiracy in the case of *State v. Smith*, 240 So.2d 807 (1970), where that Court stated at page 890:

> "An indictment or information for conspiracy must contain a statement of the facts relied on as constituting the offense in ordinary and concise language, with as much certainty as the nature of the case will admit, in such a manner as to enable a person of common understanding to know what is intended, and with such precision that the accused may plead his acquittal or conviction to a separate indictment or information based on the same facts."

The Respondent recognizes that an Impeachment proceeding is not strictly a criminal proceeding, but the Respondent would contend that it is generally accepted that an Impeachment proceeding is essentially quasi-criminal, and that further, where the House of Representatives has elected to use a criminal violation as a basis for impeachment, then the Board of Managers are required to allege a criminal violation in such a manner so that the Respondent can properly plead to the allegation and so that he will not be embarrassed in preparing his defense.

The Respondent would respectfully submit that in an Impeachment proceeding the Respondent runs greater risks than in a normal criminal case. The right of appeal exists in all criminal cases. Except in limited circumstances, Impeachment proceedings are not reviewable.

In criminal cases there is provision made for full or conditional pardons, restoration of civil rights, commutation of punishment and remission of fines and forfeitures. However, while these remedies might exist in all criminal cases, except for the offense of treason, Article IV, Section 8 of the Constitution of the State of Florida provides that where impeachment results in conviction the basic right to apply for clemency does not apply.

Therefore, the Respondent would respectfully submit that it is essential that this Honorable Court preserves the Respondent's right to a fair trial and due process. Most trial judges rule with the luxury of knowing that if an error is committed, that error can be later corrected by an appellate court. Here, the Respondent has no automatic right to appeal. Here, the Respondent has no right to seek clemency, even though one convicted of a capital offense within this State may. It is for these reasons that the Respondent respectfully submits that basic fairness requires, and due process requires, that the Respondent should not be called upon to defend against an improper or defective allegation.

Obviously, the Respondent cannot criminally conspire with himself. In *Pearce v. State*, 330 So.2d 783 (1st DCA, Fla. 1976) the Court stated at page 784:

> "The gravamen of the offense in criminal conspiracy is the agreement between two or more persons."

Yet, Article II fails to advise this Respondent with whom it is alleged that he has conspired. Essential justice requires that the Board of Managers name the person or persons with whom the Respondent is supposed to have conspired.

The statutory elements of the offense of criminal conspiracy are not contained within Article II. There is not an allegation contained therein that properly advises your Respondent as to the time that he is supposed to have entered into this conspiracy, nor does the accusatory instrument advise your Respondent as to when this alleged conspiracy ended. While Article II purports to list what appears to be "overt acts", the listing of these alleged overt acts are of no assistance to the Respondent in his attempt to prepare a defense to this defective and improper accusatory pleading.

The Respondent would respectfully submit that perhaps there is no other criminal offense in law where an individual runs greater risk of conviction than conspiracy. It is generally recognized that prosecutors can obtain more conviction, with less evidence, for the charge of criminal conspiracy than for any substantive offense.

In the case of *State v. Dayton*, 215 So.2d 87 (3d DCA, Fla. 1968), the appellate court upheld the trial court's action in quashing the conspiracy count for insufficiency, and in that case the Court found that the Information was deficient because it did allege when the conspiracy was entered into, nor was it alleged until what date the conspiracy continued.

In the case of *Glasgow v. State*, 292 So.2d 370 (4th DCA, Fla. 1974) the appellate court reversed the conspiracy convictions of the defendants, finding that the conspiracy count was basically a conclusionary allegation. The Court found that the allegations of the conspiracy count were insufficient as a matter of law and cited with approval *State v. Smith*, 240 So.2d 807 (1970). It is interesting to note that in *Glasgow, supra*, the count alleging conspiracy was far more informative than the conspiracy allegation contained within Article II of the Articles Of Impeachment.

In conclusion, the Respondent respectfully submits that as a matter of law, as a matter of basic fairness, he is entitled to properly prepare a defense. The language contained within Article II is such that the Respondent is unable to know what acts he is supposed to have committed which constituted a criminal conspiracy.

Respectfully submitted,
Ronald K. Cacciatore
Attorney for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished to MARC H. GLICK, ESQUIRE, Attorney for the Board of Managers of the House of Representatives, 208 House Office Building, Tallahassee, Florida, by first class mail this 29th day of August, 1978.

Ronald K. Cacciatore
Attorney

MANAGERS' REPLY TO RESPONDENT'S MOTION TO DISMISS ARTICLE II OF THE ARTICLES OF IMPEACHMENT

On April 12, 1978, the Florida House of Representatives unanimously voted five Articles of Impeachment against Samuel S. Smith, Circuit Court Judge, Third Judicial Circuit, State of Florida (hereinafter referred to as Respondent).

Article II alleged Respondent's misdemeanor in office, to-wit:

Conspiracy to unlawfully obtain and distribute in excess of approximately 1500 pounds of Marijuana.

Respondent maintains in his Motion to Dismiss Article II that it is so vague, indistinct and indefinite as to mislead the Respondent and embarrass him in the preparation of his defense and expose him after conviction or acquittal to substantial danger of another impeachment proceeding for the same offense.

Respondent further complains that the Article fails to tract the language of the Florida Statute as would be required in an indictment or information in a criminal proceeding.

Respondent's first contention is so specious as to merit no discussion beyond the fact that Article II succinctly states that the Respondent set into motion and actively participated in a conspiracy to illegally obtain and unlawfully distribute approximately 1500 pounds of Marijuana. The Article goes on to list 20 separate overt acts committed by the Respondent which includes the names of the people with whom he conspired, the dates of his conspiratorial acts and the acts themselves. Article II leaves no room for doubt as to which of Respondent's actions are alleged to be misdemeanor in office.

Respondent's second contention is of no greater merit. It is supported neither in the history nor the law of impeachment. It is well settled that an indictable offense is not a necessary element of a misdemeanor in office. Therefore, it stands to reason that the indictment form is not required in charging misdemeanor in office. It is a matter of precedent going back to the foundation of our law in England and a matter of precedent in this country, that, "articles of impeachment are substituted for an indictment and distinguished from it by less particularity of specification." Vol. 3, Chapter LXVII, Hind's Precedents, Section 2117. Further, in Chapter LIII of Jefferson's Manual, the following sketch is given of some of the principles and practices on the subject of impeachment:

"Articles. The accusation (articles) of the Commons is substituted in place of an indictment. Thus, by the usage of Parliament, in impeachment for writing or speaking, the particular words need not be specified." (Sach. Tr., 325; 2 Wood., 602, 605; Lords' Journ., 3 June, 1701; 1 Wms., 616)

Section 17(a) of Article III of the Constitution of the State of Florida confers upon the House of Representatives the power to impeach a circuit court judge for misdemeanor in office:

"The House of Representatives is clothed with the sole power to impeach and all impeachments are to be tried by the Senate. Since the House of Representatives is clothed with the sole power of impeachment (of an official), it necessarily follows that it has the power to determine whether the charges brought against him amount to misdemeanor in office as contemplated by our Constitution." In Re: *Investigation of Circuit Judge Holt*, 93 So. 2d 601 (1957)

Impeachment of a judicial officer historically is neither a criminal nor a civil procedure. It is a process unto itself and was brought about to protect the people from the tyranny of the courts. Quoting from the position of the Managers affirmed by the Senate in the Trial of Judge Kelly:

"The charge for which a man may be impeached does not have to involve moral turpitude nor does it have to involve the violation of a statutory law. Impeachment reaches beyond and above and exclusive of those crimes for which a person may be charged in the lower courts. The Constitution of the State of Florida says that a man may be impeached for misdemeanor in office. It does not say a crime. It does not say a high crime and misdemeanor as several other states do. It merely says a misdemeanor in office. This could include the violation of statutory law, it could include an act involving moral turpitude but it does not have to and does not necessarily."

We need but turn to Justice Glenn Terrell's discussion of misdemeanor in office in his brief before the Impeachment Trial of Circuit Judge George Holt to bring us to an understanding of what is required in the pleadings or articles.

Under English practice, many offenses were impeachable which were not punishable as crimes at common law. The State Constitution does not attempt to define what offenses are contemplated by the phrase any misdemeanor in office...

In his well documented article, Mr. Wrisley Brown points out that to determine whether an act or a course of conduct is sufficient in law to support an impeachment, resort must had to the external principles of right, applied to the public propriety and civic morality. The offense must be prejudice to the public interest and it must flow from a wilfull intent or a reckless disregard to duty to justify invocation of the remedy. It must act directly or be a reflected influence to react upon the welfare of the state.

Turning again to Justice Terrell's brief, his study of the federal cases settles beyond question that impeachment will lie not only for offenses punishable by statute, but that it may be predicated on a course of conduct that reveals unfaithfulness to trust or which brings the office or officer into discredit or displaces public confidence with public distrust. That statement by Justice Terrell is tantamount to the law in this area in Florida and no where can there be or is the use of an indictment contemplated.

All this is a proceeding for the purpose of removing an official who has violated his public trust and it cannot be shown that there is an analogy between articles of impeachment and indictments beyond the fact that they are both charges of wrongdoing such to subject articles of impeachment to the case law that has grown up around indictments.

"The articles need not pursue the strict form of an indictment. Great looseness is allowed in their construction and it is customary to make those resolutions, as well as articles with a statement of facts which they contain." Foster on the Constitution at page 609 (speaking of the Minnesota Impeachment of Judge Page).

Respondent further cites case after case after case pointing to the standards required in a criminal indictment. These cites are wholly inappropriate in an impeachment context. The landmark case upon his point is the case of *Humphries v. State*, 17 Fla. 381, 1879, in which it says for the first time that, "it has long been well settled that where the offense is one prescribed and defined by statute, it must be charged in the very language of the statute or in language of equal import."

The Managers ask what is our statute? There is no statute! What does our Constitution say? The Constitution of the State of Florida says this:

". . . judges of circuit courts shall be liable to impeachment for misdemeanor in office. The house of representatives by two-thirds vote shall have the power to impeach an officer. . . ."

Even assuming that the impeachment article must meet the standards of the usual criminal indictment, Article II is unquestionably sufficient to describe "misdemeanor in office" as contemplated by the Constitution.

The Senate of Florida on July 10, 1957, when faced with a Motion to Strike or Dismiss the Articles of Impeachment against Judge Holt for reasons similar to those raised by the Respondent, voted to deny Holt's Motion. Such is the precedent in this case.

In Conclusion, the Managers contend that Respondent's Motion to Dismiss Article II is without merit: (1) as to the allegation that it is vague, and (2) as to the recitation that it must comply with the standards set for indictments.

WHEREFORE, the Managers pray said Motion be denied.

Respectfully submitted,
Marc H. Glick, Counsel to the Board of Managers on the Part of the House of Representatives

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Managers' Reply to Respondent's Motion to Strike Article II of the Articles of Impeachment has been furnished by U.S. Mail to Honorable Ronald K. Cacciatore, Counsel for the Respondent, at Suite 401, The Legal Center, 725 East Kennedy Boulevard, Tampa, Florida 33602, this 7th day of September, 1978.

Marc H. Glick

MOTION TO DISMISS ARTICLE V OF THE ARTICLES OF IMPEACHMENT

COMES NOW the Respondent, SAMUEL S. SMITH, by and through his undersigned attorney, pursuant to Rule 29 of the Rules of Practice and Procedure when sitting on the Trial of Impeachments as adopted by The Florida Senate, and Rule 3.190(b) of the Florida Rules of Criminal Procedure, and files this, his Motion to Dismiss Article V of the Articles Of Impeachment, which said Articles were adopted by resolution of the House of Representatives on April 12, 1978 and for grounds therefor would respectfully show unto the Court as follows:

1. That the acts set forth in Article V, the proof of which the Board of Managers will contend is to justify The Senate in returning a conviction against your Respondent are in fact a restatement of the allegations and alleged acts previously charged in Articles I through IV of the Articles Of Impeachment.

2. That the allegations contained in Article V are in sum and substance the same allegations contained in Articles I through IV of the Articles Of Impeachment, and that further, proof of the allegations contained within Article V will be the same as the proof required concerning the allegations contained within Articles I through IV of the Articles Of Impeachment; that the alleged violations set forth in Article V are the same violations as set forth in Articles I through IV of the Articles Of Impeachment, and hence, the allegations contained within Article V are inconsistent and repugnant to the violations set forth within the preceding Articles Of Impeachment, and your Respondent respectfully contends that a conviction by The Senate on Article V of the Articles Of Impeachment cannot stand.

3. That Article V of the Articles Of Impeachment should be dismissed as being multiplicitous within the meaning of that term under Florida law.

4. The Respondent would respectfully submit that normal appellate remedies are not available to him in this matter and that in order for the Respondent to receive a fair trial in this cause, the Respondent must be tried on allegations that are not inconsistent, repugnant or multiplicitous.

5. The Respondent would further submit that in the event this Honorable Court should determine that the alleged violations set forth in Article V are not inconsistent with and repugnant to the alleged violations set forth in Articles I through IV of the Articles of Impeachment, the requiring of the Board of Managers to elect Counts or Articles upon which the Board of Managers will rely for a conviction will not remove the prejudice that has attached to your Respondent inasmuch as in the Impeachment Proceeding The Senate will sit as both judge and jury.

WHEREFORE, Your Respondent respectfully prays that this Honorable Court will grant this Motion and dismiss Article V of the Articles Of Impeachment for the reasons stated in the Motion.

DATED this 30th day of August, 1978.

Ronald K. Cacciatore
Attorney for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished to MARC H. GLICK, ESQUIRE, Attorney for the Board of Managers of the House of Representatives, 208 House Office Building, Tallahassee, Florida 32304, by first class mail this 30th day of August, 1978.

Ronald K. Cacciatore
Attorney

LEGAL MEMORANDUM IN SUPPORT OF MOTION TO DISMISS ARTICLE V OF THE ARTICLES OF IMPEACHMENT

The Respondent respectfully submits that the law is well settled in Florida that where violations are separate and distinct offenses (or violations) and the same subject matter is involved in both offenses, and proof of one is proof of the other, the violations are in law inconsistent violations and one may not can be convicted of both violations. *Carlton v. State,* 145 So. 249 (1933) and *Johnson v. State,* 333 So. 2d 505 (1st DCA, Florida, 1976).

The Respondent recognizes the rule adopted in Florida that where various counts composing an information or indictment are not repugnant to or consistent with one another, the granting or denial of a motion to elect rests within the sound judicial discretion of the trial court. *Pearce v. State,* 196 So. 685 (1940) and *Channel v. State,* 107 So. 2d 284 (2d DCA, Fla. 1958).

Apparently, where the counts are inconsistent and repugnant to one another, it is error for a trial court to deny a timely motion for the prosecution to elect upon which count it will rely for a conviction. *Costin v. State,* 198 So. 467 (1940).

Unlike a usual criminal case, an Impeachment Proceeding is such that The Senate functions both as Judge and Jury.

Hence, in this setting, the Respondent respectfully submits that a motion to elect, and the granting of such a motion, is not the proper remedy in this situation.

The Respondent respectfully submits that by allowing the Board of Managers to proceed with multiplicitous Article, the Respondent will be prejudiced in the eyes of The Senate to the extent that he will be denied a fair trail on the merits and due process. Exactly the same evidence is required to prove Article V as is required to prove the preceding Articles of Impeachment.

What the Board of Managers have attempted to accomplish with the Articles Of Impeachment as they now read is to prejudice the Respondent so that he cannot receive a fair trial. It is apparent that the Board of Managers intends by proving one or two alleged criminal violations to convince The Senate that the Respondent should be convicted of each and every separate Article Of Impeachment. The Respondent respectfully submits that Article V is multiplicitous and that therefore Article V of the Articles Of Impeachment should be dismissed.

Respectfully submitted,
Ronald K. Cacciatore
Attorney for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished to MARC H. GLICK, ESQUIRE, Attorney for the Board of Managers of the House of Representatives, 208 House Office Building, Tallahassee, Florida, 32304, by first class mail this 30th day of August, 1978.

Ronald K. Cacciatore
Attorney

MANAGERS' REPLY TO RESPONDENT'S MOTION TO DISMISS ARTICLE V OF THE ARTICLES OF IMPEACHMENT

Articles of Impeachment were voted against the Respondent by the Florida House of Representatives on April 12, 1978. These Articles cited Respondent with misdemeanor in office and by their unanimous passage, the House asked that Respondent be removed from office and disqualified from holding any office of honor, trust or profit in this state in the future.

The Articles contained five separate and distinct charges constituting Respondent's misdemeanor in office: Article I, *Conviction of a Felony*, addressed Respondent's adjudication of guilt by a jury of his peers and the loss thereby of his presumption of innocence. Article II, *Conspiracy to Unlawfully Obtain and Distribute in Excess of Approximately 1500 Pounds of Marijuana*, charged the Respondent with setting into motion and actively participating in a conspiracy to illegally obtain and unlawfully distribute Marijuana. The Article went on through the listing of overt acts to indicate the individuals with whom the Respondent conspired, the dates of his conspiratorial acts and the acts themselves. Article III, *Attempted Bribery of Officers of the State of Florida to Influence Performance of Their Official Duties*, charged the Respondent and alleged with particularity that he had on two occasions attempted to influence the performance of Suwannee County Sheriff Robert Leonard's official duties by corruptly offering and promising him a share in one hundred thousand dollars ($100,000.00) on one occasion and one hundred fifty thousand dollars ($150,000.00) on a second. The Article further recounts the Respondent attempted to influence the performance of Assistant State Attorney Virlyn Willis' legal duties by offering him three hundred and fifty thousand dollars ($350,000.00). Article IV, *Subverting the Judicial Process*, alleges three instances where the Respondent endeavored to obstruct the normal course of the legal system and subvert the judicial process. On two occasions destruction orders were offered to cover the illicit removal of marijuana from the Evidence Vault at Suwannee County Jail. A third episode entails the delay or prevention of proper investigation into his activities. Article V, *Conduct Unbecoming a Judicial Officer Resulting in Lowering the Esteem of the Judiciary*, alleges that the Respondent has by his infamy and the reasonable and probable consequences of the acts he has committed, debased and degraded his office and court into disrespect, scandal, disgrace, discredit, disrepute and reproach to the prejudice of public confidence in the administration of justice therein and to the integrity and impartiality of the State Judiciary placing a stigma thereon so as to render him unfit to continue to serve as a judge or public officer. The essence of each preceding count is listed as an example of Respondent's conduct which has lowered esteem in our System of Justice.

In his Motion to Dismiss Article V, Respondent contends that the Article V charges are multiplicitous and in sum and substance the same allegations contained in the preceding Articles.

Article V on its face is addressed at a misdemeanor in office committed by Respondent which is separate and distinct from each pattern of conduct alleged in the other four Articles.

Of all the alleged misdemeanors in office it is possibly the most grevious because to lower the esteem of our Judicial System and his Court victimizes the public trust and damages the citizens of this state as no other offense can.

Lowering the esteem of the Judiciary is not a loss of one's presumption of innocence, a marijuana conspiracy, bribery, or subversion of the judicial process. It stands along with the other Articles as a unique and solid charge to which Respondent must answer.

Arguably Respondent could be acquitted of Article V and convicted of any or all of the others. Conversely he could be convicted of Article V alone.

We need but look to historical precedent of the U. S. Senate Impeachments of Judge Halsted Ritter and Judge Robert W. Archbald to see in the context of the other charges the viability of an article adopted like Article V.

Article V was modeled after the article on which U. S. District Judge Halstead Ritter was convicted upon impeachment and presents a case in point.

Seven articles were preferred against him; six alleged specified misconducts, the seventh charged lowering the esteem of the Judiciary.

While all the articles survived motions to strike and dismiss, Ritter was acquitted of the first six but convicted on the seventh charge which, among other things, amounted to general misbehavior.

Judge Archbald was impeached on thirteen articles. Unlike Manager's Article V which charges a separate and distinct act from Articles I - IV, the final article against Archbald merely summarized the preceding twelve articles. All of the thirteen articles survived motions to strike and Judge Archbald was convicted of Articles I, III, IV and VI as well as Article XIII. From this we can draw that even if Article V was a summary or multiplicitous as to the preceding four, which it is not, there is no precedent for its being dismissed.

Misdemeanor in office has been defined as:

"A misdemeanor in office, as grounds for impeachment, has much broader coverage than the common law misdemeanor as usually defined and applied in criminal procedure. As applied in impeachment, misdemeanor in office may include any act involving moral turpitude which is contrary to justice, honesty, principles of good morals, if performed by a virtue of authority of office. A misdemeanor in office is synonymous with misconduct in office and is broad enough to embrace any willful malfeasance, misfeasance or nonfeasance in office. It may not necessarily imply corruption or criminal intent."

"The law writers generally hold that while the offense must be committed during the incumbency in office, it need not be committed under cover of office. An act which rendered by the Court to be scandalous in the personal life of a public officer and shakes the confidence of the people in his administration of public affairs and impairs his official usefulness, although it may not directly affect his official integrity, it may be characterized as a high crime or misdemeanor and may fall—and may not fall—within the prohibitory letter of the penal statutes." 93 So.2d 601 (Fla. 1957).

From this it can be clearly seen that each of the Articles preferred against Respondent is a separate misdemeanor in office as contemplated by the courts of law and impeachment precedent.

In conclusion, the Managers maintain that Article V is not multiplicitous and that Respondent's Motion to Dismiss should be denied.

Respectfully submitted,
Marc H. Glick, Counsel to the Board of Managers on the Part of the Florida House Of Representatives

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion of Managers' Reply to Respondent's Motion to Dismiss Article V of the Articles of Impeachment has been furnished by U. S. Mail to Honorable Ronald K. Cacciatore, Counsel for Respondent, at Suite 401, The Legal Center, 725 East Kennedy Boulevard, Tampa, Florida 33602, this 7th day of September, 1978.

Marc H. Glick

MOTION TO PERMIT USE OF PRIOR TESTIMONY TAKEN UNDER OATH

COMES NOW the Board of Managers on the Part of the House of Representatives (hereinafter referred to as Managers), by and through their undersigned counsel, pursuant to Rule 29 of the Rules of Practice and Procedure of the Florida Senate Sitting as Court of Impeachment and Section 92.22, Florida Statutes, and files this Motion to Permit the Use of Prior Testimony Taken Under Oath of Homer F. Ratliff, given in a previous trial, which will be unavailable at the impeachment trial, and as grounds therefor would respectfully show the Court as follows:

1. The testimony of Homer F. Ratliff was taken under oath in the case of *United States of America v. Samuel S. Smith*, et al., United States District Court, Middle District of Florida, Jacksonville Division, Case Numbers 77-14-Cr-J-R and 77-14(S)-Cr-J-R, and Respondent in this cause had a full opportunity to cross-examine at that time on substantially the same issues as are involved in the present proceeding.

2. In view of action taken last week at a Deposition Hearing where Homer F. Ratliff invoked the Fifth Amendment right to remain silent, it is anticipated by the undersigned counsel that Homer F. Ratliff will maintain his silence at the impeachment trial, thereby rendering his testimony unavailable in this cause.

3. Managers would contend there is a substantial reason that Homer F. Ratliff's testimony cannot be had and will be unavailable for the purposes of the impeachment trial. By claiming the constitutional right not to be forced to give evidence which would tend to incriminate him, the witness has placed himself and his testimony just as unavailable as if he were deceased or absent from the jurisdiction. *United States v. Milano*, 443 F. 2d 1022 (10th Cir. 1971); *Mason v. United States*, 408 F. 2d 903 (10th Cir. 1969); *United States v. Allen*, 400 F. 2d 611 (10th Cir. 1969); *Alexander v. Bess*, 167 So. 533 (Fla. 1936); *Habig v. Bastian*, 158 So. 508 (Fla. 1935); *Pendleton v. State*, 348 So. 2d 1206 (Fla. 4th D.C.A. 1977); *see also* Annot., 45 A.L.R. 2d 1354 (1956). "The important element is whether the *testimony* of the witness is sought and is available and not whether the witness's body is available." *Mason v. United States*, supra, at 906.

4. Managers would represent that such prior testimony in the former trial of Respondent was reported stenographically in the presence of the Court and that the report of such testimony is a correct one.

5. Managers would further represent that the testimony of Homer F. Ratliff is material to the Managers' case and that it is necessary to permit the use of this prior testimony taken under oath to prevent failure of justice. Managers would also note that they raised no objection to, and fully cooperated with, Respondent's Motion to perpetuate the testimony of Dr. Lamar Crevasse, which motion resulted from the same motivation to insure justice as does Managers' motive in this instance.

6. In the event that this Motion to Permit Use of Prior Testimony is granted, Managers would suggest that Counsel for Respondent and Counsel for Managers agree upon an extraction of such testimony that would be relevant and material in this case. In this regard, Managers would submit for consideration the attached extraction of prior testimony of Homer F. Ratliff including cross-examination, which was utilized by the House of Representatives during the impeachment proceedings.

WHEREFORE, Managers respectfully pray this Honorable Court permit the use of the prior testimony of Homer F. Ratliff taken under oath in the above-mentioned federal trial of Respondent to be read into evidence in the present impeachment trial.

Respectfully submitted,
Marc H. Glick, Counsel to the Board of Managers on the Part of the House of Representatives

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion to Permit Use of Prior Testimony Taken Under Oath has been furnished by U.S. Mail to Honorable Ronald K. Cacciatore, Counsel for Respondent, to Suite 401, The Legal Center, 725 East Kennedy Boulevard, Tampa, Florida 33602, this 8th day of September, 1978. A copy has also this date been placed at the Tallahassee Hilton awaiting Mr. Cacciatore's arrival.

Marc H. Glick

ORDER ON PRE-TRIAL MOTIONS

In accordance with the parties' agreement at the pre-trial conference held on August 18, 1978, all written motions which will be filed by the parties, and all responses thereto, have now been submitted for determination. As of this date, the only motions pending are Respondent Samuel S. Smith's motion for a continuance of the trial date, his motions requesting the dismissal of Articles I, II, and V of the Articles of Impeachment, his motion to prohibit the Board of Managers from introducing into evidence at trial certain transcripts of recorded conversations between respondent and Robert Leonard, his motion for a pre-trial hearing to compel the Board of Managers to identify the persons with whom respondent is alleged to have conspired under Article II of the Articles of Impeachment, and the Board of Managers' motion to use at trial a transcript of Homer F. Ratliff's testimony during respondent's federal trial which is the subject matter of the charge in Article I of the Articles of Impeachment.

The undersigned presiding officer has carefully considered these motions in light of their accompanying legal memoranda, the responsive pleadings of the Board of Managers, and the precedents of the Florida and United States Senates. Pursuant to Rule 17 of the Florida Senate Rules of Practice and Procedure When Sitting on the Trial of Impeachments, it is

ORDERED:

(1) That respondent's motion to dismiss Article I of the Articles of Impeachment, which asserts that his federal conviction is not final because an appeal is pending, is denied. Article I charges that respondent is guilty of a misdemeanor in office by reason of his federal felony conviction and sentence. What constitutes a "misdemeanor in office" for purposes of Article III, Section 17(a) of the Florida Constitution, is a matter of Florida law, determinable by the House of Representatives. *Forbes v. Earle,* 298 So.2d 1 (Fla. 1974).

> "The House of Representatives is clothed with the sole power to impeach and all impeachments are to be tried by the Senate. Since the House of Representatives is clothed with the sole power of impeachment (of an official), it necessarily follows that it has the power to determine whether the charges brought against him amount to a 'misdemeanor in office' as contemplated by our Constitution." *In re Investigation of a Circuit Judge,* 93 So.2d 601, 603-04 (Fla. 1957) (dicta).

The appeal of respondent's conviction in no way affects its status as a basis for the charge embodied in Article I.

(2) That respondent's motion to dismiss Article II of the Articles of Impeachment, which asserts that the Article is impermissibly vague, is denied. The charge is sufficiently detailed and definite, alone or in conjunction with other discoverable materials, that respondent will not be embarrassed or misled in the preparation of his defense, or subject to subsequent impeachment proceedings for the same offense. A comparable motion to dismiss was denied by the Florida Senate in the 1957 impeachment trial of Circuit Judge Holt.

(3) That respondent's motion to dismiss Article V of the Articles of Impeachment, which asserts that the charges are multiplicitous and provable by the same evidence required for conviction under Articles I through IV, is denied. The charge that respondent's conduct has impugned the integrity of the judiciary can properly be considered by the House of Representatives to constitute a misdemeanor in office, even though some or all of the evidence therefor is adduced in the course of proving Articles I through IV. The gravamen of the charge contained in Count V is not multiplicitous under Florida law. See *Eggart v. State,* 40 Fla. 527, 535, 25 So. 144, 146 (1898).

(4) That respondent's motion to prohibit the introduction into evidence, or the use as an aid to understanding, of transcripts of recorded conversations between respondent and Robert Leonard, which asserts that the transcriptions are not the best evidence, are hearsay, create undue emphasis, and represent non-expert opinion evidence, is denied. Having been prepared under Robert Leonard's direction and authority, the transcription is admissible, or usable as an aid to understanding, under Rule 18 of the Florida Senate Rules of Practice and Procedure When Sitting on the Trial of Impeachments, which provides:

> "Any evidence that is relevant and probative may be admitted, unless privileged or unless the Constitution otherwise requires its exclusion."

(5) That respondent's motion for a pre-trial hearing to ascertain the names of persons with whom he is alleged to have committed the conspiracy charged in Article II, which asserts that additional identification is a necessary predicate for the admission of statements by co-conspirators, is denied. Article II, alone or in conjunction with other identification data supplied to respondent by the Board of Managers, or otherwise available, sufficiently identifies the persons with whom respondent is alleged to have conspired.

(6) That respondent's motion for a continuance, which asserts that respondent is physically unable to attend and withstand an impeachment trial at this time, is deferred and referred for consideration to the Special Committee on Impeachment Rules at its pre-trial meeting scheduled at 10:00 a.m. on September 13, 1978, at which time counsel for respondent and the Board of Managers may present medical testimony and other relevant evidence to the Committee concerning the need for a continuance.

(7) That the Board of Managers' motion to use at trial a transcript of Homer F. Ratliff's testimony, which asserts that Mr. Ratliff will refuse to testify at respondent's impeachment trial, is deferred for ruling until such time as the use of Mr. Ratliff's transcribed testimony becomes necessary.

Dated: September 11, 1978.

Arthur J. England, Jr.
Chief Justice
Supreme Court of Florida
Presiding Officer

ORDER ON MOTION TO USE PRIOR TESTIMONY

On the basis of Homer F. Ratliff's refusal to testify in this proceeding based on the Fifth Amendment to the United States Constitution, the Board of Managers has moved on the authority of Section 92.22, Florida Statutes (1977), to introduce into evidence a transcript of his testimony at respondent Samuel S. Smith's federal trial.

Ratliff agreed to testify at respondent's federal trial under the terms of a plea bargain arrangement with the prosecuting attorneys in that case. He now asserts that his testimony in this proceeding might tend to incriminate him further. In *Rogers v. United States,* 340 U.S. 367, 374 (1951), the Court stated that one who has waived his right to remain silent by testifying voluntarily on one matter may still assert the privilege on a different matter if further testimony might subject him "to a 'real danger' of further crimination."

The assertion of a Fifth Amendment privilege at a second proceeding makes a witness "no less unavailable than death or

absence from the country or physical inability to speak." *United States v. Mobley,* 421 F.2d 345, 351 (5th Cir. 1970). Under such circumstances, a duly authenticated transcript of the witness' prior testimony may be admitted into evidence if the party against whom it is to be used had a fair opportunity to confront and cross-examine the witness fully on the same issues in the earlier proceeding. See, e.g., *United States v. Wilcox,* 450 F.2d 1131 (5th Cir. 1971); Cf. *Pendleton v. State,* 348 So.2d 1206 (Fla. 4th DCA 1977). These conditions for admissibility are met in this situation. Ratliff was thoroughly cross-examined by respondent's counsel at the federal trial. Respondent does not contend that his counsel in the federal trial, who is not his present attorney, was ineffective.

Inasmuch as Ratliff's refusal to testify constitutes a "substantial reason" for the Board of Managers' inability to produce him as a witness, within the meaning of Section 92.22(4), and the other requirements of Section 92.22 are satisfied, it is

ORDERED:

that the motion to introduce a transcription of Homer F. Ratliff's prior testimony is granted.

Arthur J. England, Jr.
Chief Justice
Supreme Court of Florida
Presiding Officer

STIPULATION: SCOPE OF EVIDENCE

THIS STIPULATION AND AGREEMENT, made and entered by and between the Board of Managers on the Part of the Florida House of Representatives, by and through their undersigned Counsel, and the Respondent, Samuel S. Smith, by and through his undersigned Counsel, is as follows:

The evidence to be presented by the parties in the Impeachment Trial of Samuel S. Smith, Circuit Court Judge, Third Judicial Circuit of the State of Florida, on Articles preferred by the Florida House of Representatives, April 12, 1978, shall be limited to the exhibits, facts, circumstances and dates in the case of *United States of America v. Samuel S. Smith,* United States District Court for the Middle District of Florida, Jacksonville Division, Case Numbers 77-14-Cr-J-R and 77-14 (S)-Cr-J-R.

Respectfully submitted,
Marc H. Glick

Counsel for the Board of Managers on the Part of the House of Representatives

Ronald K. Cacciatore
Counsel for Respondent

Robert H. Nutter
Counsel for Respondent

Approved:

Arthur J. England, Jr.
Chief Justice, Florida Supreme Court,
and Presiding Officer, Senate
Impeachment Trial

STIPULATION: TAPE RECORDINGS OF SMITH/LEONARD CONVERSATIONS/AUTHENTICITY/CHAIN OF CUSTODY

THIS STIPULATION AND AGREEMENT, made and entered by and between the Board of Managers on the Part of the Florida House of Representatives, by and through their undersigned Counsel, and the Respondent, Samuel S. Smith, by and through his undersigned Counsel, is as follows:

1. That tape recordings of the face-to-face conversations made on September 10, 1976 and November 16, 1976, are authentic and contain the voices of Samuel S. Smith and Robert Leonard.

2. It is stipulated that there have been no alterations, deletions or additions to the tapes; and, the chain of custody of said tapes has been in the Federal Bureau of Investigation under their procedures and the Clerks of the Circuit Court and Appeals Court which have heard the case.

3. Managers agree that on the basis of the above stipulation, they will not introduce the Logs of the Chain of Custody of the tapes.

4. Managers further agree that the only taped conversations they will introduce are those described above. It is agreed that tapes exist of telephonic conversations of September 9, 1976, and the morning of November 16, 1976, where Sheriff Leonard called Judge Smith and the face-to-face meetings (tapes of which are referred to above) were arranged. It is also agreed that the taped conversation of September 22, 1976, will not be used as it is garbled.

5. It is stipulated that for the purpose of playing tapes before the Court of Impeachment, they may be advanced to the point where the conversations between Sheriff Leonard and Judge Smith begin. Further, the playing of the tapes may be terminated where their discussions end. Those portions of the tapes excluded contain no conversation or material of any evidentiary value in this cause.

Respectfully submitted,
Marc H. Glick
Counsel to the Board of Managers on the Part of the House of Representatives

Ronald K. Cacciatore
Counsel for Respondent

Robert H. Nutter
Counsel for Respondent

Approved:

Arthur J. England, Jr.
Chief Justice, Florida Supreme Court,
and Presiding Officer, Senate
Impeachment Trial

STIPULATION: USE OF CERTIFIED COPIES

THIS STIPULATION AND AGREEMENT, made and entered by and between the Board of Managers on the Part of the Florida House of Representatives, by and through their undersigned Counsel, and the Respondent, Samuel S. Smith, by and through his undersigned Counsel, is as follows:

Certified copies of exhibits, court documents and other materials where otherwise admissible may be introduced in evidence and otherwise employed in the place of the original documents.

Respectfully submitted,
Marc H. Glick
Counsel to the Board of Managers on the Part of the House of Representatives

Ronald K. Cacciatore
Counsel for Respondent

Robert H. Nutter
Counsel for Respondent

Approved:

Arthur J. England, Jr.
Chief Justice, Florida Supreme Court,
and Presiding Officer, Senate
Impeachment Trial

STIPULATION: PHOTOGRAPH OF RESPONDENT UNAVAILABLE FOR INTRODUCTION

THIS STIPULATION AND AGREEMENT, made and entered by and between the Board of Managers on the Part of the Florida House of Representatives, by and through their undersigned Counsel, and the Respondent, Samuel S. Smith, by and through his undersigned Counsel, is as follows:

There is a photograph previously introduced into evidence which is unavailable which said photograph depicts that during the month of September, 1976, Samuel S. Smith had a mustache.

Respectfully submitted,
Marc H. Glick
Counsel for the Board of Managers on the Part of the House of Representatives

Ronald K. Cacciatore
Counsel for Respondent

Robert H. Nutter
Counsel for Respondent

Approved:

Arthur J. England, Jr.
Chief Justice, Florida Supreme Court,
and Presiding Officer, Senate
Impeachment Trial

STIPULATION: MARIJUANA IN PARKING LOT SEPTEMBER 20, 21, 22, 1976

THIS STIPULATION AND AGREEMENT, made and entered by and between the Board of Managers on the Part of the Florida House of Representatives, by and through their undersigned Counsel, and the Respondent, Samuel S. Smith, by and through his undersigned Counsel, is as follows:

It is stipulated and agreed that a load of Marijuana originally seized by Sheriff Robert Leonard was placed in a locked rental truck in the parking lot south of the Suwannee County Jail on September 20, 21 and 22, 1976. Information was released that said Marijuana has been seized and was in the parking lot. During this period there was no attempt by anyone to obtain said Marijuana.

Respectfully submitted,
Marc H. Glick
Counsel to the Board of Managers on the Part of the House of Representatives

Ronald K. Cacciatore
Counsel for Respondent

Robert H. Nutter
Counsel for Respondent

Approved:

Arthur J. England, Jr.
Chief Justice, Florida Supreme Court,
and Presiding Officer, Senate
Impeachment Trial

STIPULATION: BALED SUBSTANCE, MARIJUANA

THIS STIPULATION AND AGREEMENT, made and entered by and between the Board of Managers on the Part of the Florida House of Representatives, by and through their undersigned Counsel, and the Respondent, Samuel S. Smith, by and through his undersigned Counsel, is as follows:

1. It is stipulated and agreed that the 1500 pounds of baled substance obtained from the U.S. Customs and loaded on the rented truck and taken into custody by Sheriff Robert Leonard at the I-10 Agricultural Inspection Station and later conveyed by Sheriff Leonard to the Suwannee County Landfill on November 16, 1976 was Marijuana.

2. On the basis of this Stipulation, Managers agree not to introduce actual samples of Marijuana, pictures of the red and white Chevrolet truck onto which the Marijuana was allegedly loaded from the rental truck at the Suwannee County Landfill, or pictures of the bales of Marijuana in a shed.

3. Managers further agree that of the original 1500 pounds of Marijuana only 900 pounds were recovered and 600 pounds were not recovered and have not been recovered.

4. Managers stipulate to the fact that a beeper transmitter was implanted in the Marijuana by Sheriff Leonard prior to its being brought to the Suwannee County Landfill in the rental truck. At some point the beeper's signal terminated and the transmitter was not to be found in the 900 pounds of Marijuana which were recovered.

5. The parties also stipulate as to the fact that no arrests or prosecutions separate from the case of *United States of America v. Samuel S. Smith*, et al., were made as a result of the 600 pounds that were missing.

6. It is stipulated and agreed that Judge Smith never had physical possession of Marijuana at any time with regard to this case.

Respectfully submitted,
Marc H. Glick
Counsel to the Board of Managers on the Part of the House of Representatives

Ronald K. Cacciatore
Counsel for Respondent

Robert H. Nutter
Counsel for Respondent

Approved:

Arthur J. England, Jr.
Chief Justice, Florida Supreme Court,
and Presiding Officer, Senate
Impeachment Trial

EXHIBITS

UNIFORM EXHIBITS

IN RE: THE IMPEACHMENT TRIAL OF SAMUEL S. SMITH, CIRCUIT JUDGE OF THE THIRD JUDICIAL CIRCUIT OF FLORIDA, ON ARTICLES OF IMPEACHMENT PREFERRED AGAINST HIM BY THE FLORIDA HOUSE OF REPRESENTATIVES.

STIPULATION

THIS STIPULATION AND AGREEMENT, Made and entered by and between the BOARD OF MANAGERS on the Part of

the Florida House of Representatives, by and through their undersigned counsel, and the Respondent, SAMUEL S. SMITH, by and through his undersigned counsel, appearing specially on questions of jurisdiction and law, is as follows:

1. There is attached hereto and made a part hereof "UNIFORM EXHIBITS BEFORE THE COURT OF IMPEACHMENT, VOLUME ONE" and the parties stipulate to their authenticity and use by the Court of Impeachment.

2. The parties further agree that this list may be enlarged to include any further documents or exhibits which may come to the attention of any party or may be requested by the Court of Impeachment.

Respectfully submitted,
MARC H. GLICK
Counsel for the Board of Managers on the Part of the House of Representatives
Tallahassee, Florida

JOSEPH C. JACOBS
Counsel for Respondent, Samuel S. Smith, appearing specially
Tallahassee, Florida

Approved:

Ben F. Overton, Chief Justice
Supreme Court of Florida

Exhibit A

(1) January 14, 1977 Indictment of Samuel S. Smith by the Grand Jury of the United States District Court, Middle District of Florida

(2) February 25, 1977 Indictment of Samuel S. Smith by the Grand Jury of the United States District Court, Middle District of Florida

Exhibit B

Jury Verdict in *U.S.A. vs. Samuel S. Smith*—April 29, 1977

Exhibit C

Judgment of Conviction and Sentence Against Samuel S. Smith June 3, 1977

Exhibit D

BEFORE THE JUDICIAL QUALIFICATIONS COMMISSION—June 23 & December 1, 1977

(1) Request for Suspension of Circuit Judge Samuel S. Smith

(2) Notice of Formal Proceedings Against Judge Samuel S. Smith

(3) Certificate of Probable Cause Against Judge Samuel S. Smith

Exhibit E

Rule to Show Cause in the Supreme Court of Florida re Suspension of Judge Samuel S. Smith Without Pay—June 23, 1977

Exhibit F

Judge Samuel S. Smith's Response to Rule to Show Cause—June 25, 1977

Exhibit G

Supreme Court Decision to Suspend Judge Samuel S. Smith Without Pay, CASE NO. 51,908, 347 So.2d. 1024—June 30, 1977

Exhibit H

(2) Judge Samuel S. Smith's Answer to the Notice of Formal Proceedings—July 11, 1977

(2) Notice of Hearing on January 18, 1978 Before the Judicial Qualifications Commission. In re Inquiry Concerning a Judge

Exhibit I

Letter to Governor Reubin O'D. Askew from Judge Samuel S. Smith re Resignation—January 13, 1978

Exhibit J

Letter from Governor Reubin Askew to Judge Samuel S. Smith re Resignation—January 17, 1978

Exhibit K

Speaker's Letter Creating Select Committee to Inquire Into the Conduct of Circuit Court Judge Samuel S. Smith—January 31, 1978

Exhibit L

Speaker's Letter Appointing Select Committee on Impeachment: Inquiry Into the Conduct of Circuit Court Judge Samuel S. Smith—February 1, 1978

Exhibit M

(1) Transcripts of the Select Committee on Impeachment Inquiry Into Judge Samuel S. Smith re Determination of Indigency—February 21, 1978

(2) Financial Affidavit of Judge Samuel S. Smith

(3) Determination of Indigency and Appointment of Counsel in Federal Court—December 2, 1977

Exhibit N

Request for an Attorney General's Opinion by Representatives Tucker and Rish on Question of Indigency—March 8, 1978

Exhibit O

Attorney General's Opinion on Judge Samuel S. Smith's Right to Counsel—March 16, 1978

Exhibit P

Transcripts of the Select Committee on Impeachment Inquiry Into Judge Samuel S. Smith re Determination of Indigency—March 21, 1978

Exhibit Q

Journal of the Florida House of Representatives, Wednesday, April 12, 1978, Pages 169 through 174, Containing the Report of the Select Committee, Articles of Impeachment, and Unanimous Vote of the Florida House of Representatives Adopting Said Articles

Exhibit R

Smith v. Henderson and Brantley, et al In the Circuit Court, Second Judicial Circuit, in and for Leon County, Florida, Case No. 78-953—April and May, 1978

(1) Complaint for Declaratory Decree and Amended Complaint

Decision in the Case of *Williams v. Smith* re Retirement in the Supreme Court of Florida

Letter from Joseph Jacobs to Senator Brantley—April 13, 1978

Letter to Joseph Jacobs from Dr. L. G. Landrum, M.D.—April 14, 1978

(2) Motion of the Attorney General and Governor to Intervene

(3) Response to Motion to Intervene

(4) Order of the Court Permitting Intervention

(5) Notice of Hearing for May 10, 1978

Exhibit S

Judge Joanos' Initial Order: Scheduling a Final Hearing, Dismissing Defendants Kennedy and Henderson, Denying Governor, Attorney General, President and Secretary of the Senate's Motion to Dismiss, Joining Board of Managers on the Part of the House as Party Defendants—May 11, 1978

Exhibit T

Summons and Service to Judge Samuel S. Smith in re the Matter of the Impeachment Trial in The Florida Senate—April 24, 1978

(1) Summons

(2) Certified Copy of House Resolution 1560 Adopted April 12, 1978

(3) Notice of Hearing for Friday, April 28, 1978

(4) Rules of Practice and Procedure on the Trial of Impeachment of The Florida Senate

(5) Return and Affidavit

Exhibit U

Judge Samuel S. Smith's Request for Continuance

Exhibit V

(1) Proposed Order of the Chief Justice to The Florida Senate on the Question of Counsel and Continuance—May 9, 1978—with attachments:

April 13, 1978 Letter from Jacobs to Brantley

February 13, 1978 Letter from Jacobs to Rish

February 10, 1978 Letter from Dr. L. G. Landrum, M.D., to Jacobs with attachments

April 3, 1978 Letter from Jacobs to Glick

April 19, 1978 Letter from Jacobs to Overton

For Reference to Complaint for Declaratory Decree see EXHIBIT R

(2) Notice of Proceedings Before the Senate May 12, 1978 on a Motion for Continuance and Appointment of Counsel

(3) Report of Chief Justice re Scheduling

(4) Report of the Special Rules Committee and Amendment Thereto as Passed by The Florida Senate, Sitting as a Court of Impeachment, May 12, 1978

Exhibit W

Commission of Judge John W. Peach to Serve During the Impeachment of Judge Samuel S. Smith as Per Article III, Section 17, Constitution of Florida

MANAGERS' EXHIBITS

Exhibit 1—Dr. John L. Wilson's letter

Exhibit 2—Samuel S. Smith's Indictments

Exhibit 3—Samuel S. Smith Jury Verdict

Exhibit 4—Samuel S. Smith Conviction and Sentencing

Exhibit 5—Ratliff Plea Agreement (for identification—not introduced)

Exhibit 6—Consent to Record Conversation between Sheriff Robert Leonard and Samuel S. Smith 9/10/76

Exhibit 7—Transcript of Conversation between Sheriff Robert Leonard and Samuel S. Smith 9/10/76 (for identification)

Exhibit 8—Consent to Record Conversation between Sheriff Robert Leonard and Samuel S. Smith 11/16/76

Exhibit 9—Transcript of Conversation between Sheriff Robert Leonard and Samuel S. Smith 11/16/76 (for identification)

Exhibit 10—Samuel S. Smith Acknowledgement of Miranda Warning

Exhibit 11—Tape of Conversation between Sheriff Robert Leonard and Samuel S. Smith 9/10/76

Exhibit 12—Tape of Conversation between Sheriff Robert Leonard and Samuel S. Smith 11/16/76

Exhibit 13—Picture of Marijuana (for identification—not introduced)

RESPONDENT'S EXHIBITS

Exhibit 1—Medical Records: Dr. L. G. Landrum; Dr. John T. Patterson—East Jefferson General Hospital; Dr. Earl K. Shirey—Cleveland Clinic

Exhibit 2—Medical Records: Shands Teaching Hospital and Clinics—Dr. Lamar Crevasse

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